In the Supreme Court
OF THE
United States

October Term, 1976

No. 76-1544

Douglas K. Knutson, Arlen N. Benham, Geoffrey Beaty, Laura Duarte, Evan Francis Williams, Joseph W. Berthiaume, Kenneth W. Jackson, Jean E. Nyland, Daniel A. Dutra, Willard B. Kittredge, Robert A. Dutra,

Petitioners,

vs.

The Daily Review, Inc., a corporation, Bay Area Publishing Co., a corporation, Floyd L. Sparks, an individual, William Chilcote, an individual, Dallas Cleland, an individual, John Clark, an individual, Carl Felder, individually and doing business as Felder Enterprises,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

G. Joseph Bertain, Jr.,
Timothy H. Fine,
W. Thomas Amen,
Patrick J. Carter,
50 California Street, Suite 955,
San Francisco, California 94111
Telephone: (415) 981-4938
Attorneys for Petitioners.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94108

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No.

DOUGLAS K. KNUTSON, ARLEN N. BENHAM, GEOFFREY BEATY, LAURA DUARTE, EVAN FRANCIS WILLIAMS, JOSEPH W. BERTHIAUME, KENNETH W. JACKSON, JEAN E. NYLAND, DANIEL A. DUTRA, WILLARD B. KITTREDGE, ROBERT A. DUTRA,

Petitioners,

vs.

THE DAILY REVIEW, INC., a corporation, BAY AREA PUBLISHING CO., a corporation, FLOYD L. SPARKS, an individual, WILLIAM CHILCOTE, an individual, DALLAS CLELAND, an individual, JOHN CLARK, an individual, CARL FELDER, individually and doing business as Felder Enterprises,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 2, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals is officially reported at 548 F.2d 795 (9th Cir. 1976). It appears as *Appendix A* to this petition. The opinion of the United States District Court for the Northern District of California is officially reported at 383 F.Supp. 1346 (N.D. Cal. 1974). It appears as *Appendix B* to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 2, 1976. A timely petition for rehearing filed by petitioners herein was denied December 30, 1976. *Appendix D* to this petition. A timely petition for rehearing and rehearing en banc filed by respondents herein was denied February 8, 1977. *Appendix E* to this petition. This petition for ceritorari was filed within 90 days of February 8, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

This petition involves a newspaper distribution system which the courts below found to be illegal because the publisher's contracts with its dealers, including petitioners, unlawfully fixed the resale price of the newspaper. When petitioners' attorney notified the publisher by letter of the illegal nature of its

contracts with petitioners and requested the opportunity to negotiate a new lawful contract, the publisher retaliated by terminating its contracts with petitioners and other dealers. Thereafter, the publisher replaced those terminated, including petitioners, with employees but continued to use its unlawful price fixing contract with dealers not replaced by employees. The questions presented here are:

1. Based upon the undisputed evidence and the facts as found by the district court, was the termination of petitioners' contracts in furtherance of the price fixing conspiracy? The court of appeals affirmed the conclusion of the district court that it was not.

2. Was the district court in error when it held as a matter of law that petitioners' loss of their newspaper distribution businesses was not caused by the publisher's illegal price fixing contracts? Although raised on appeal, the court of appeals did not address itself to this issue.

3. Was the district court's rejection of petitioners' method of establishing the going concern value of their newspaper distribution businesses based upon an erroneously narrow standard of proof? Although raised on appeal, the court of appeals did not address itself to this issue.

4. The court of appeals reversed the district court and ordered a new trial on loss of profits damages only and limited it to 6 of the 11 petitioners. Did the court of appeals erroneously deny 3 of the 11 petitioners the opportunity to prove their price fixing

damages, using the same method approved for the aforementioned six, at the upcoming new trial on damages?

STATUTES INVOLVED

SECTION 4 OF THE CLAYTON ACT, 15 U.S.C. § 15

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323 §4, 38 Stat. 731; 15 U.S. Code, Sec. 15.

SECTION 1 OF THE SHERMAN ACT, 15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; August 17, 1937, Chap. 690, Title VIII, 50 Stat. 693; July 7, 1955, Chap. 281, 69 Stat. 282; December 21, 1974, Public Law 93-528, Sec. 3, 88 Stat. 1708; December 12, 1975, Public Law 94-145 (Antitrust Procedures and Penalties Act), 89 Stat. 801; 15 U.S. Code, Sec. 1.

STATEMENT OF THE CASE[1]

Plaintiffs in this antitrust action were independent contractors, known as dealers, who purchased, distributed and resold either *The Argus* or *The Daily Review* newspaper in assigned territories located in Alameda County, California. CT 1453.

Defendants are two corporations and five individuals. The Daily Review, Inc. ("DRI") is a California corporation organized on November 10, 1953, with its principal place of business at Hayward, California. DRI publishes *The Argus, The Daily Review,* and *The Daily Review Shopping News,* a weekly free shopper. Bay Area Publishing Co. ("BAPCO") is a California corporation organized on June 8, 1960, with its principal place of business in San Francisco, California. BAPCO conducts most of its business at Livermore, California, where it publishes the *Tri-Valley Herald* ("Herald") and the

[1]Petitioners were the plaintiffs in the District Court and will hereinafter be referred to as plaintiffs. Respondents were the defendants in the District Court and will hereinafter be referred to as defendants. RT refers to the Reporter's Transcript of the trial proceedings; CT refers to the Clerk's Transcript on appeal to the United States Court of Appeals; and Plts. Ex. refers to plaintiffs' exhibit admitted in evidence at the trial.

Tri-Valley News ("News"). BAPCO is a wholly owned subsidiary of DRI. None of the plaintiffs herein had any contractual relationship with BAPCO. Floyd L. Sparks ("Sparks") is the controlling shareholder of DRI, the president of DRI and BAPCO, and publisher of *The Argus, The Daily Review,* the *Herald,* and the *News.* William Chilcote ("Chilcote") is the business manager of DRI. Dallas Cleland ("Cleland") is the director of circulation of *The Argus, The Daily Review,* the *Herald* and the *News.* John Clark ("Clark") is the assistant circulation manager of *The Daily Review* and promotion manager of *The Daily Review, The Argus,* the *Herald,* and the *News.* Carl Felder, doing business as Felder Enterprises, is an independent contractor engaged in the solicitation of new subscribers for newspapers, including those involved in this case. CT 1453-54.

The Daily Review is published daily, in the afternoon Monday through Saturday, and in the morning on Sunday. It circulates in Hayward, San Leandro, Fremont, Newark, Livermore and elsewhere in southern Alameda County. As of March 31, 1973 it had a paid circulation of approximately 42,778. *The Argus* is a seven-day morning daily newspaper circulated in Fremont, Newark, Union City, and elsewhere in southern Alameda County. Its paid circulation as of September 30, 1972 was 11,982. The *Herald* (formerly the *Livermore Herald & News*) and the *News* (formerly the *Village Pioneer*) both circulate in the Livermore Valley. The *Herald* is a seven-day morning daily with approximately 10,000 paid circulation

while the *News* is a three-day per week, controlled circulation[2] afternoon paper of 37,000 circulation.

In approximately 1950 Sparks adopted the independent dealer system for distribution of *The Daily Review.* At this time Sparks was operating on a marginal basis and he was interested in keeping his costs down. Thereafter this system was used for distribution of each daily newspaper acquired by Sparks or DRI so that in May, 1973, all daily newspapers published by companies owned or controlled by Sparks were distributed through dealers. CT 1457; RT 546-548.

Under this distribution system each dealer, including plaintiffs, was a party to a Dealers' Agreement with DRI which fixed the resale prices of the newspapers sold by the carriers. The dealer purchased his copies of *The Argus* or *The Daily Review* from DRI and resold them for his own account to independent carriers—boys and girls under the age of 18. These carriers, in turn, resold the newspapers to home delivery subscribers. Each dealer was engaged as an independent contractor pursuant to the terms of a written dealership agreement, not as an employee of DRI. Upon purchase of the newspapers each dealer had complete ownership of, possession of, and dominion over the papers. DRI did not reimburse a dealer for unsold copies, and the dealers had to sustain all losses

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[2]A controlled circulation newspaper is one which is distributed on a voluntary basis, i.e., the home subscriber may choose whether or not to pay the subscription price when called upon by the carrier.

from carrier defalcations. Each dealer owned such equipment as was necessary for the distribution of the newspapers to the carriers. The dealers derived their profit and paid their expenses from the difference between the price at which they sold the newspapers to their carriers and the price at which they purchased the papers from DRI. CT 1457-58.

In the distribution of *The Daily Review, The Argus* and *Herald,* DRI and BAPCO utilized adult motor route distributors to distribute the newspapers in certain hill and canyon areas. These distributors purchased their papers from DRI or BAPCO and resold them directly to the subscribers. The adult motor route distributors operated under the same Dealers' Agreement as the plaintiffs. RT 83-88.

Distribution of *The Daily Review, The Argus* and *Herald* to retail accounts and to vending machine purchaser was handled by independent contractors known as "street sales dealers" who purchased the newspapers from DRI or BAPCO and resold them for their own account. They too operated under the same Dealers' Agreement as the plaintiffs. RT 76, 78, 80.

On May 14, 1973, counsel for plaintiffs wrote a letter to Sparks which alleged that certain provisions of the Dealers' Agreement then in force constituted anticompetitive trade practices and impinged on plaintiffs' status as independent contractors. Specifically, the letter alleged that the following practices established by the agreement were anticompetitive: Resale price maintenance under which the publisher set the

rate at which the carrier sold the paper to the subscribing public; the existence of non-uniform rates at which plaintiffs purchased the newspapers from the publisher; territorial restrictions on the dealers; and potential confiscation of the dealer's property rights in his business by means of the thirty-day cancellation provisions. CT 1461. As set forth in this letter, counsel to plaintiffs "recommended to his clients that they attempt to settle their differences rather than engage in protracted antitrust litigation." Counsel advised Mr. Sparks, "I am prepared to meet your attorneys to discuss the above." CT 654.

On May 21, 1973, James C. Paras, Esq. of the law firm of Morrison, Foerster, Holloway, Clinton & Clark, telephoned the law offices of G. Joseph Bertain, Jr. and asked for Mr. Fine. Mr. Fine was not there at the time and Mr. Paras left a message with the secretary to return his call. CT 654.

On May 22, 1973 Mr. Fine returned Mr. Paras' telephone call and spoke to Mr. Paras personally. Mr. Paras informed Mr. Fine that his firm represented DRI, that he had a copy of Mr. Fine's letter to Mr. Sparks dated May 14, 1973, but had not yet studied it, that they would study it and discuss it with their client, and that he would get back to Mr. Fine on it. Mr. Paras also informed Mr. Fine that this may take a little time but that he would be back in touch with Mr. Fine. CT 655.

By July 12, 1973, Mr. Fine had not received any response from Mr. Paras or any other person representing DRI. On that date he wrote Mr. Paras a

letter stating, in part, "I will appreciate a response to the subject matter of my letter of May 14 as soon as possible so that I can advise my clients accordingly." No response was ever made to this letter. CT 655.

After receipt of Mr. Fine's letter in May 1973, circulation director Cleland told Sparks, "That we just must exercise as much influence on the price as we possibly can;" and, "There would be less deviation of price among carrier boys than there would be among dealers." The basis for Mr. Cleland's opinion was his experience in West Virginia where "when a boy takes a newspaper route, he wants to know the price of the paper. So we tell him. And this is what he sells the paper for, or what he collects for the paper." RT 165-166; 211-212.

On July 25, 1973, DRI notified by letter all of its *Daily Review* and *Argus* dealers of the termination of the Dealers' Agreements, effective at the close of business on August 31, 1973. CT 655.

On July 25, 1973 BAPCO notified by letter all of its *Herald* and *News* dealers of the termination of their Dealers' Agreements, effective at the close of business on August 31, 1973. CT 655.

Sparks testified that at the time he made the decision in July to partially change his distribution system it was not part of his thinking to change from fixing retail prices to a suggested price program. RT 622. The suggested price program came about in "mid-October" 1973 after the filing of this case. RT 622.

At the time Sparks made the decision to change a portion of his distribution system he was earning spectacular profits, the greatest in the company's history, and his return on gross revenues was above the industry mean. Plts. Ex. 218, under a protective order, sets forth a five-year summary (5/31/69-5/31/73) of Sparks' financial operating results. Professor Rosse, defendants' expert, testified that 16 to 20% was the mean industry return. RT 2435. Thus, Sparks' decision to change a portion of his distribution system was not brought about by any adverse economic conditions.

Among the dealers notified of their termination on July 25, 1973, was William Felder, the street sale dealer for *The Daily Review*. Plts. Ex. 15A. Thereafter Dallas Cleland, director of circulation, approached William Felder about becoming an employee of DRI. Mr. Felder signed a statement on July 30, 1973 accepting employment with DRI effective September 1, 1973. Plts. Ex. 15B. However, William Felder did not become an employee of DRI but has remained to date as an independent contractor for the purchase, distribution and sale of *The Daily Review* to retail accounts and vending machine purchasers. RT 94-95. William Felder assumed, in respect to his remaining as an independent contractor after September 1, 1973, that the terms of his Dealers' Agreement (Plts. Ex. 15) continued in effect. RT 884-885, 888-889.

Prior to September 1, 1973 there were two adult motor route distributors utilized in the distribution of

The Daily Review. Both of these distributors were also dealers for *The Daily Review*. On September 1, 1973, both of these dealers became employees for DRI. Their motor routes were taken over on September 1, 1973 by a Norma Potts and a Robert Alameda as independent contractors. Both Mrs. Potts and Mr. Alameda were requested by Dallas Cleland on or about September 1, 1973 to sign a Dealers' Agreement which they did. Plts. Exs. 16, 17. The Dealers' Agreements were signed and returned to DRI by Mrs. Potts and Mr. Alameda, but said agreements were not executed by DRI. DRI did not inform either Mrs. Potts or Mr. Alameda that the Dealers' Agreements had not been executed by the company. Cleland admitted that he led Mrs. Potts and Mr. Alameda to believe that the agreements would, in fact, be signed by DRI. RT 88-90. The Dealers' Agreements signed by Mrs. Potts and Mr. Alameda were the same as plaintiffs', which were terminated on July 25, 1973. Plts. Exs. 16, 17; RT 192-93.

On July 25, 1973, the defendants notified *The Argus* and *Herald* street sale dealers of their terminations effective September 1, 1973 but said terminations did not take effect and they have remained as independent contractors to date. RT 100-101.

Cleland testified that the reason the street sale dealers and the motor route distributors for *The Daily Review* were continued as independent contractor operations after September 1, 1973 and not converted to employee operations was "we felt that these people would be more sympathetic to our views of a uniform price. We would have less deviation with these people than we would with anybody else." RT 180, 389-90.

On September 1, 1973 sixteen of the twenty-three *Daily Review* districts were converted from an independent dealer/independent carrier operation to an employee/independent carrier operation. Also on September 1, 1973 five of the ten *Argus* districts and all of the *Herald* districts were converted from an independent dealer/independent carrier operation to an employee/independent carrier operation. RT 102-104. Plaintiffs Knutson, Benham, Jackson, and Robert Dutra continued as dealers until November 1, 1974 when their districts were converted to an employee/independent carrier operation. Plaintiff Duarte continued as a dealer until April 1, 1975 when her district was converted to an employee/independent carrier operation. Plaintiffs Beaty, Williams, Berthiaume, Nyland, Daniel Dutra and Kittredge continued as dealers until July 1, 1975 when their districts were converted to an employee/independent carrier operation.

That the illegal fixing of retail prices was the cause of the termination of plaintiffs' status as *Daily Review* and *Argus* dealers was made clear from the following testimony by Sparks:

> "Q. Mr. Sparks, as I understand your testimony, you would not have acted any different had, instead of receiving my letter of May 14, your *Daily Review* dealers had increased their price, is that correct?
>
> "A. That's correct.
>
> * * * * *

"Q. Is it your testimony that had the dealers exercised price freedom in '72 or '71 or '70 or '69 you would have acted the same way?

"A. It is my opinion we would have done that." RT 3755-57.

Plaintiffs established the going concern value of their newspaper distribution businesses based upon their comparability to newspaper distribution businesses of *The Sacramento Union* which have been bought and sold as going concerns during the period from 1968 to the date of trial.

Circulation director Dallas Cleland admitted the similarity of *The Daily Review* and *Argus* dealer operation to that of *The Sacramento Union*. RT 215. *The Sacramento Union* newspaper distribution businesses are strikingly comparable to plaintiffs' for the following reasons:

First are the dealer contracts. *The Sacramento Union* home delivery dealer contracts in effect until March 1, 1973 provided for the sale of the business or the termination of the contract with or without cause upon 30 days' advance notice. Plts. Ex. 41B; RT 982. DRI's Dealer Agreement had virtually the same provisions. Plts. Ex. 1; RT 56.

Second is the mode of distribution. *The Sacramento Union, The Daily Review* and *The Argus* were distributed in their primary market area to home subscribers by the publisher selling to adult dealers who, in turn, sold the newspaper to carrier boys and girls who, in turn, sold the newspaper to the home subscriber. *The Sacramento Union, The Daily Review* and *The Argus* were distributed in their primary market area to retail outlets and vending machine purchasers by the publisher selling to adult street sale dealers who, in turn, sold the newspaper to retail outlets and to purchasers from vending machines. RT 964-67. In the outlying areas, dealers for *The Sacramento Union* and *The Daily Review* handled both home delivery and street sales. RT 1794.

Third, is the frequency of publication. *The Sacramento Union* and *The Argus* are published seven days a week in the morning. *The Daily Review* is published six days a week in the afternoon and in the morning on Sunday. RT 964.

Fourth, are the advertised monthly retail subscription prices. From November 1, 1969 to April 1, 1974 the advertised monthly retail subscription prices of *The Sacramento Union, The Daily Review* and *The Argus* were as follows:

Dates	Sac. Union	Daily Review	The Argus
11/1/69-4/1/70	2.50	2.75	2.00
4/1/70-1/1/71	3.00	2.75	2.00
1/1/71-3/1/73	3.00	2.75	2.50
3/1/73-2/1/74	3.00	2.75	3.00
2/1/74-4/1/74	3.00	3.25	3.00

Fifth, is the nature of the competition. The principal competition to *The Sacramento Union* is *The Sacramento Bee,* an afternoon paper, Monday through Friday, and a morning paper on Saturday and Sunday. *The Sacramento Bee* has approximately 175,000 circulation compared to 107,000 of *The Sacramento*

Union. CT 1526. The principal competition to *The Daily Review* and *The Argus* is *The Oakland Tribune,* an afternoon paper, Monday through Friday, and a morning paper on Saturday and Sunday. *The Oakland Tribune* has approximately 275,000 circulation compared to the 42,778 of *The Daily Review* and the 11,982 of the *Argus*. Also home delivered in the marketing area of *The Sacramento Union, The Daily Review* and *The Argus* is the *San Francisco Chronicle*. RT 1005-06; CT 1526.

Sixth, *The Sacramento Union, The Daily Review* and *The Argus* have a large turnover of home subscribers and rely heavily upon both office solicitation (boy crews and telephone boiler rooms) and dealer and carrier solicitation. RT 2705-06.

The price fixing dealer agreements between DRI and the plaintiffs were cancelled effective September 1, 1973. Plaintiffs were free after September 1, 1973 to establish their own prices to their carriers. The damage trial of this case commenced on April 16, 1974. At that time only the six *Daily Review* plaintiffs had sufficient market data to prove the loss of profits damages they suffered as a result of the illegal price fixing. These six are entitled to a new trial on damages according to the opinion of the court of appeals. Three *Argus* dealers, Beaty, Benham and Dan Dutra, had not had sufficient market data by the time of the April 16, 1974 damage trial to ascertain their loss of profits damages using the same method of proof as *The Daily Review* plaintiffs. As a result they used a different method of proof which was not acceptable to the court of appeals. However, since the April 16, 1974 damage trial these three plaintiffs now have the market data to prove their price fixing damages using the same method of proof as *The Daily Review* plaintiffs—a method of proof that meets with the approval of the Court of Appeals. However, the Court of Appeals denied these three plaintiffs' request to prove their damages, using the accepted method of proof, at the new trial on damages. This request was contained in their petition for rehearing.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals is in conflict with applicable Supreme Court decisions, weakens the effectiveness of the private action under Section 4 of the Clayton Act as a vital means for enforcing the antitrust policy of the United States and adversely affects tens of thousands of dealers and franchisees throughout the United States.

Plaintiffs contend that the termination of *The Daily Review, Argus, Herald* and *News* dealers' contracts, including plaintiffs', was for the unlawful purpose of continuing the illegal price fixing conspiracy that had been in existence from 1950 until September 1, 1973. The undisputed evidence clearly supports such a conclusion.

First, only those individuals likely to exercise price freedom were notified of their termination. Minor carriers were not, because defendants felt it unlikely

that the carriers would deviate from the advertised prices.

Second, all street sale dealers' terminations were rescinded because, according to Cleland, "we feel that these people would be more sympathetic to our views of a uniform price. We would have less deviation with these people than we would with anybody else." RT 180. This, like the first reason, clearly shows that the refusals to deal were for the purpose of eliminating actual and potential dealers who would not adhere to the advertised prices.

Third, defendants utilized the very Dealers' Agreement that was terminated by the July 25, 1973 notifications, to contract with two new motor route distributors on September 1, 1973. Surely, such action belies defendants' contention that the new system was adopted to eliminate the practices which had been claimed to be unlawful. CT 1478.

Fourth, Sparks admitted that when the decision was made in July to make a change in his distribution system it was not part of his thinking to change from fixing retail prices to a suggested price program. RT 622. According to Sparks the suggested price program came about in "mid-October" 1973 after the commencement of this litigation.

Fifth, Sparks testified that had the dealers exercised price freedom in 1969, 1970, 1971 or 1972, he would have taken the same actions that he did in this case. Surely, such an admission demonstrates that the terminations were in furtherance of the price fixing conspiracy.

It is well established that refusals to deal to eliminate dealers who will not abide by the manufacturer's retail prices constitute "arrangements restraining trade." *United States v. Parke, Davis & Co.,* 362 U.S. 29; *Albrecht v. Herald Co.,* 390 U.S. 145; *Klor's v. Broadway-Hale Stores,* 359 U.S. 207. On the undisputed facts cited above it is clear that the terminations of *The Daily Review, Argus, Herald* and *News* dealers' contracts were for the unlawful purpose of continuing the price fixing conspiracy.

The court of appeals refused to consider the evidence admitted at trial establishing the price fixing "combinations" between DRI and the street sale dealers and motor route distributors which arose after plaintiffs were notified of their termination on July 25, 1973.

The reasons the court of appeals did not consider this very important and critical evidence was explained in its footnote 8:

> "In their complaint, plaintiffs alleged two vertical restraints on trade: (1) the dealership agreements in effect from 1969 until the terminations, and (2) the carrier agreements used after the terminations. On appeal, they raise also the 'combinations' between the publisher and (a) the street sale dealers and/or (b) the motor route distributors. We may not consider the new claims; they were not raised below and unlike *Perma Life Mufflers, supra,* note 5, where the Supreme Court permitted such a 'shotgun' approach, this is not an appeal from a summary judgment but from a full-fledged trial and the district court's detailed findings of fact and con-

clusions of law. Moreover, these agreements and the carrier agreements go to Sparks' alleged continuation of the retail price fix after the illegal contracts were terminated. If they were in furtherance of the scheme, no additional 'contract combination or conspiracy' need be shown. The dealership agreements were not raised on appeal." 548 F.2d at 804, fn. 8.

Footnote 8 is incorrect. The facts are just the opposite. As heretofore set forth this evidence was introduced at the liability trial as proof of Sparks' alleged continuation of the retail price fix after the plaintiffs' illegal dealer agreements were terminated.

This evidence was strongly stressed by the plaintiffs before the district court but the district court only mentioned it in passing in its opinion. *Knutson v. The Daily Review, Inc.*, 383 F.Supp. 1346, 1355, fn. 8 (N.D.Cal. 1974). On appeal plaintiffs stressed this evidence in support of their second legal issue that the termination of plaintiffs and the other home delivery dealers was for the purpose of continuing the unlawful price fixing as witnessed by the use of the illegal price fixing agreements after the plaintiffs' terminations. *Opening Brief*, pp. 35, 36.

In view of the Court of Appeals' conclusion that "If they [illegal price fixing agreements used by defendants with the street sale dealers and motor route distributors] were in furtherance of the scheme, no additional 'contract, combination or conspiracy' need be shown" (548 F.2d at 804, fn. 8), then this Court should, in light of the foregoing evidence which was

properly introduced in evidence and urged in support of the appeal, clearly hold that the terminations were in furtherance of an illegal price fixing conspiracy in violation of Section 1 of the Sherman Act. *Albrecht v. Herald Co., supra.*

In its opinion the court of appeals did not deal directly with the legal issue presented by plaintiffs in their appeal which stated:

> "Was the district court in error when it held as a matter of law that plaintiffs' loss of their newspaper distribution businesses was not caused by the defendants' dealers' agreement found illegal by the district court?" *Opening Brief*, pp 80-81.

This is an issue pertaining not to liability but to "fact of damage". There is no dispute that plaintiffs were terminated and lost their dealerships as a result of bringing to defendant Sparks' attention the illegality of his company's dealer agreements. The district court so found:

> "The terminations complained of here were determined necessary by the publisher to change the system of distribution of his newspapers in order to avoid the antitrust violations alleged to exist in his old system . . ." 383 F.Supp. at 1366.

Defendants do not dispute this fact. The issue raised is of extreme importance to the enforcement of the antitrust laws and is strictly a question of law, to wit: Should plaintiffs who have lost their businesses as a direct and proximate result of challenging an illegal restraint of trade, be entitled to recover damages for the value of their businesses?

Plaintiffs maintain that Section 4 of the Clayton Act provides for the recovery of the value of their dealerships since the loss of their dealerships was the direct result of challenging the illegal dealer agreements. *Standard Oil Company of California v. Moore,* 251 F.2d 188, 211 (9th Cir. 1957); Cf. *Mulvey v. Samuel Goldwyn Productions,* 433 F.2d 1073, 1075, fn. 3 (9th Cir. 1970); *Osborn v. Sinclair Refining Co.,* 324 F.2d 566, 571-72 (4th Cir. 1963).

There are very important reasons why damages resulting from a direct challenge to an antitrust violation should be allowed. First and foremost is the private enforcement of the antitrust laws. As stated by the court of appeals in *Mulvey:*

> "The antitrust laws are an expression of federal public policy to foster free competition. The treble-damage action was designed to implement that policy by encouraging private suitors to enforce the antitrust laws and thereby to deter potential violators from undertaking the forbidden conduct." 433 F.2d at 1075.

This policy would be frustrated if a client or clients are made aware that if they challenge their suppliers' illegal price fixing activities they could lose their source of supply and businesses without any remedy. Vertical price fixing will go unchallenged by knowledgeable franchisees and dealers if there is no remedy for them if they lose their business as a result of making such a challenge.

Second, even though plaintiffs could recover the value of their dealership resulting from their challenge to an antitrust violation this would not mean that the lower court could enjoin a change in the method of distribution so long as the new method of distribution itself was legal. This would meet the concern of the court of appeals that "a manufacturer could be prevented 'from ever replacing a system of independent distributors with its own system of direct sales' . . ." 548 F.2d at 803.

Third and finally, even if there are other reasons, in addition to the antitrust challenge, for the plaintiffs' terminations this is not a reason to deny all damages for the value of plaintiffs' dealerships. As pointed out by the court of appeals in *Mulvey* there should be an apportionment of the damages. *Mulvey v. Samuel Goldwyn Productions,* 433 F.2d at 1075, fn. 3.

Furthermore, the law does not distinguish between a refusal to deal to eliminate price deviators, or a refusal to deal because of a letter objecting to an illegal price fixing arrangement or a refusal to deal because of a lawsuit attacking an illegal price fixing arrangement. *Albrecht v. Herald Company,* 452 F.2d 124 (8th Cir. 1971) (following remand and trial on the damages). Any other approach would discourage negotiation, discussion and settlement and encourage direct action and confrontation.

In *Albrecht* petitioner sold newspapers to his subscribers for more than the suggested price from 1961 until August 1964. Then in 1964 he brought a lawsuit charging resale price fixing. This Court found that in response to the lawsuit he was terminated. *Al-*

brecht v. Herald Company, 390 U.S. 145, 147-148. Yet, on remand for a determination of damages, the district court and the court of appeals upheld Albrecht's recovery for the fair market value of his route less what he had received for it under duress conditions. 452 F.2d at 131.

At the trial plaintiffs scrupulously adhered to the admonitions of the courts of appeals on the matter of proof of damages for loss of a business in an antitrust action. "The proper measure of damages was the market value of the business, i.e., the value of the goodwill of an operating business, and not the loss of earning power by appellant for his lifetime." *Simpson v. Union Oil Company of California,* 411 F.2d 897, 909 (9th Cir. 1969), *rev'd on other grounds,* 396 U.S. 13 (1969). Accord: *Farmington Dowel Products Co. v. Forster Mfg. Co.,* 421 F.2d 61 (1st Cir. 1970); *Albrecht v. Herald Company,* 452 F.2d 124 (8th Cir. 1971). Pursuant thereto plaintiffs introduced evidence of the market value of their distributorships based upon the sale prices and profits of a number of comparable *Sacramento Union* newspaper dealerships.

Plaintiffs submit that the record evidence demonstrates a very striking degree of comparability. It needs no recitation of authority that comparability does not have to be exact and that the wrongdoer cannot complain that the damages are not proven to a certainty. *Bigelow v. RKO Radio Pictures,* 327 U.S. 251.

The district court felt that there were two major weaknesses in the method of proof of going concern

value. First, that *Sacramento Union* dealerships have increased in value over the years. In this regard plaintiffs presented to the district court two separate valuations—one based on the first sale of the comparable *Sacramento Union* dealership and the other based on the sale closest in time to the September 1, 1973 terminations date, to wit:

Name of Dealer	Damages Based upon the First Sale of Comparable Sacramento Union Dealership	Damages Based upon the Sale of Comparable Sacramento Union Dealership closest in time to plaintiffs' original termination date (9/1/73)
Robert Dutra	$14,766 (Sale of Roseville on 6/1/70)	$14,766 (Sale of Roseville on 6/1/70)
Williams	$12,755 (Sale of #700 on 4/1/70)	$29,736 (Sale of #700 on 4/11/72)
Jackson	$16,285 (Sale of Roseville on 6/1/70)	$16,285 (Sale of Roseville on 6/1/70)
Nyland	$7,352 (Sale of #800 on 1/1/71)	$11,892 (Sale of #800 on 6/1/73)
Kittredge	$19,105 (Sale of #700 on 4/1/70)	$44,554 (Sale of #700 on 4/11/72)
Beaty	$20,123 (Sale of #700 on 4/1/70)	$46,928 (Sale of #700 on 4/11/72)
Benham	$19,429 (Sale of #700 on 4/1/70)	$45,309 (Sale of #700 on 4/11/72)
Knutson	$20,987 (Sale of #700 on 4/1/70)	$48,941 (Sale of #700 on 4/11/72)
Daniel Dutra	$8,558 (Sale of #700 on 4/1/70)	$19,958 (Sale of #700 on 4/11/72)

The total damages plaintiffs (except Duarte) suffered as a result of the loss of their *Daily Review* or *Argus* newspaper distribution businesses is $165,882 based upon the first sale of comparable *Sacramento Union* dealerships or $318,274 based upon the sale of comparable *Sacramento Union* dealerships closest in

time to plaintiffs' original date of termination (9/1/73).

The other major weakness cited by the district court was that the value of plaintiffs' labor was not taken into account in determining the value of their businesses. The answer to this is that when valuation is made on the basis of a comparable business you do not take into account the value of labor unless the comparable business also takes it into account. Here, a value for the labor of the *Sacramento Union* dealers' services was not determined. Therefore, it should not be taken into account in respect to plaintiffs' services.

Plaintiffs submit that the district court was in error in rejecting their loss of business damages because of lack of comparability. *Bigelow v. RKO Pictures, supra.* Although presented on appeal the court of appeals did not consider this issue.

Finally, the court of appeals ordered a new trial on the loss of profits damages only limited to the six *Daily Review* plaintiffs. These plaintiffs had independent market data prior to the April 16, 1974 damage trial upon which loss of profits from the price fixing could be based. The *Argus* dealers did not.

However, as in the case of the *Daily Review* plaintiffs, *Argus* dealers Beaty, Benham and Dan Dutra have independent data now available upon which loss of profits from the price fixing can be based. In the case of plaintiff Beaty the independent data spans the period from April 1, 1974 to June 30, 1975. In the case of plaintiff Benham, the independent data

spans the period from April 1, 1974 to November 1, 1974. In the case of plaintiff Dan Dutra, the independent data spans the period from February 1, 1975 to June 30, 1975.

Since there will be a new trial on damage for the *Daily Review* plaintiffs this Court, in the interests of justice, should permit plaintiffs Beaty, Benham and Dan Dutra to prove their damages at this new trial on damages using the method approved by the court of appeal for the *Daily Review* plaintiffs.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted,

G. Joseph Bertain, Jr.,
Timothy H. Fine,
W. Thomas Amen,
Patrick J. Carter,
Attorneys for Petitioners.

Dated: May 4, 1977.

(Appendices Follow)

APPENDICES

Appendix "A"

United States Court of Appeals
for the Ninth Circuit

Douglas K. Knutson, Arlen N. Benham, Geoffrey Beaty, Laura Duarte, Evan Francis Williams, Joseph W. Berthiaume, Kenneth W. Jackson, Jean E. Nyland, Daniel A. Dutra, Willard B. Kittredge, Robert A. Dutra,
Plaintiffs-Appellants,

vs.

The Daily Review, Inc., a corporation, Bay Area Publishing Co., a corporation, Floyd L. Sparks, an individual, William Chilcote, an individual, Dallas Cleland, an individual, John Clark, an individual, Carl Felder, individually and doing business as Felder Enterprises,
Defendants-Appellees.

No. 74-2802

The Daily Review, Inc., a corporation, Bay Area Publishing Co., a corporation, Floyd L. Sparks, an individual, William Chilcote, an individual, Dallas Cleland, an individual, John Clark, an individual,
Defendants-Appellants,

vs.

Douglas K. Knutson, Arlen N. Benham, Geoffrey Beaty, Laura Duarte, Evan Francis Williams, Joseph W. Berthiaume, Kenneth W. Jackson, Jean E. Nyland, Daniel A. Dutra, Willard B. Kittredge, Robert A. Dutra, Gayle Ely,
Plaintiffs-Appellees.

No. 74-3423
OPINION

[December 2, 1976]

Appeal from the United States District Court
Northern District of California

Before: MERRILL and HUFSTEDLER, Circuit Judges, and Smith,* District Judge.

HUFSTEDLER, Circuit Judge:

The appeals and cross-appeals in this case present a potpourri of antitrust problems in the context of a newspaper distribution system before and after the publishers' conversion of the system from independent dealer-distributors to employers of the newspaper publishers.

We first identify the *dramatis personae:* All the plaintiffs are independent distributors of the newspapers published by Daily Review, Inc. ("DRI"). Defendants are two corporations and individual officers or employees of those corporations. DRI publishes *The Daily Review,* a daily afternoon newspaper; *The Argus,* a daily morning paper; and *The Daily Review Shopping News,* a "throwaway" advertising circular. Bay Area Publishing Company ("BAPCO") publishes the *Tri-Valley Herald,* a daily morning paper; and the *Tri-Valley News,* a three-day per week, controlled circulation afternoon paper. BAPCO is a wholly-owned subsidiary of DRI. The individual defendants are Floyd L. Sparks, William Chilcote, Dallas Cleland and John Clark. Sparks is the controlling shareholder of DRI, the president of DRI and BAPCO, and the publisher of both companies' newspapers.

*Honorable Russell E. Smith, Chief Judge, United States District Court, District of Montana, sitting by designation.

William Chilcote is a vice-president and business manager of DRI and a member of the Board of Directors of DRI and BAPCO. Cleland is the director of circulation of the four newspapers published by BAPCO and DRI. Clark is the circulation promotion manager for *The Daily Review* and *The Argus.*

Plaintiffs alleged that defendants entered into horizontal and vertical agreements in restraint of trade. They claim that the dealership contracts used by DRI/BAPCO fixed resale prices and imposed territorial restraints in violation of the Sherman Act, Section 1. (15 U.S.C. § 1.) They also claim that DRI's termination of its independent dealer system violated Section 1. Finally, they argue that the defendants violated Section 2 of the Sherman Act (15 U.S.C. § 2) by attempting to monopolize the newspaper trade. The district court found for the plaintiffs on the price-fixing count, but awarded neither damages nor injunctive relief. The court found for the defendants on the remaining Section 1 counts and on the Section 2 claim. Defendants have not appealed the price-fixing holding. We affirmed the district court on the other Section 1 counts, remand for a new trial on damages, and a limited remand on the Section 2 count.[1]

[1]The defendants have cross-appealed from the partial award of costs and attorneys' fees. We do not reach this issue since there will be a partial new trial on damages. They have also cross-appealed the district court's continuation of injunctive relief; the court ordered DRI to keep open its employment offers to former distributors and not to discharge any plaintiffs unless approved by an arbitrator. We perceive no abuse of discretion in the district court's continuing its injunction pending appeal; we also dissolve the injunction as part of our remand.

In 1950 Sparks adopted an independent dealer system for the distribution of his newspapers to home subscribers Under this system, distributors purchased newspapers from the publisher and resold them to carriers (newspaper boys/girls) who delivered/resold the papers to the subscribers. There were, therefore, two independent units in the distribution system; the distributors and the carriers, both of which purchased the paper from the level above. From 1950, until 1969, relationships between the papers and the distributors were governed by a standard form Dealer's Agreement which provided that the dealer would sell newspapers to the subscribers within his route or territory at a fixed subscription price and that the subscription price, the price paid to the publisher by the dealer, and the size and boundaries of the territory were subject to change by the publisher in his sole discretion. The dealer could not assign, transfer or hypothecate rights arising under the agreement without the prior written consent of the publisher.

In 1969, a dispute arose before a state agency as to whether the BAPCO distributors were independent contractors or employees. With the assistance of a consulting firm, a new agreement was drawn up and used by DRI and its distributors. A similar agreement was used by BAPCO. The agreement fixed retail prices.[2] It provided for a dual rate wholesale

[2]Since the dealers sold to carriers, the district court found that that the agreement "establish[ed] not a resale price, but a resale, resale price, the price at which the product is actually sold to the consumer through a carrier level." (383 F. Supp. at 1350.) The

price for newspapers supplied to a distributor for his route, *i.e.*, a certain price up to a specified number of newspapers and a different price for papers above that number. The agreement permitted him to transfer his rights to another party on 60 days' notice; the transferee had to be bondable, qualified, and fully trained to DRI/BAPCO's satisfaction. Finally either party could terminate the agreement on 30 days' notice.

On May 14, 1973, plaintiffs' counsel wrote Sparks a letter stating that certain provisions of the dealer agreements used by DRI and BAPCO constituted unlawful restraints of trade. In July 1973, DRI and BAPCO, pursuant to the 30-day termination provision, notified all distributors that they were terminating their entire independent dealer system for home delivery and converting to a system of employee-distributors. Under the internal system of distribution, employees of DRI and BAPCO sold the newspapers directly to the independent carriers. Each terminated dealer was offered employment as a salaried district manager within the new system.

On August 6, plaintiffs filed this action; defendants agreed to continue to sell newspapers to the plaintiffs

court found that the agreement presumed the dealers would take all reasonable steps to insure that the carriers sold at the announced subscription price. Under this agreement, distributor profits were derived from the difference between the distributor's purchase price from the publisher and his sale price to the carrier. DRI did not set a uniform wholesale price for all distributors, but varied the price to arrive at an agreed-upon income for each distributor.

and to hold open the offers of employment.[3] This agreement was later formalized in a stipulated temporary injunction.

Plaintiffs allege that defendants entered into both horizontal and vertical contracts, combinations or conspiracies. They claim that the post-1969 agreements were unlawful contracts to fix resale prices and to impose territorial restraints on the distributors. They also claim that the termination provision and the actual terminations were violations of Section 1.

I

A. *Intraenterprise Conspiracy.*

Plaintiffs assert that DRI and BAPCO conspired to appropriate the distribution organizations without compensation by converting the entire distribution system. The district court found that there was no conspiracy in fact since the plaintiffs "presented no evidence other than Sparks' decision, such as the active participation of other corporate officers or agents in this decision [to terminate], which would support a finding that DRI and BAPCO combined or conspired to violate § 1." (383 F. Supp. at 1359).

Section 1 prohibits conspiracies in restraint of trade between two or more people in economic entities. As a purely verbal matter, the officers or directors of a corporation can "conspire," and any contract they

[3]After trial, the district court relieved DRI of its employment obligations because of its precarious financial condition.

make restrains trade. For antitrust purposes, if the Sherman Act forbids such activities it:

> ". . . would be socially inconvenient and historically surprising. So long as the business enterprise is regarded as an individual economic unit, it must be permitted to act." (P. Areeda, Antitrust Analysis 319 (2d ed. 1974).)

The problem has been to define an economic unit. In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.* (1951) 340 U.S. 211, 215, the Supreme Court held that two separately incorporated subsidiaries within the same corporate family can conspire: "common ownership and control does not liberate [them] from the impact of the antitrust laws . . . especially . . . where [the corporations] hold themselves out as competitors." *(Kiefer-Stewart, supra,* 340 U.S. at 215 (wholly-owned subsidiaries). *Accord: Perma Life Mufflers v. Int'l Parts Corp.* (1968) 392 U.S. 134, 141-142 (parent and wholly-owned subsidiary); *Timken Roller Bearing Co. v. United States* (1951) 341 U.S. 593, 598 (parent and partially-owned subsidiary).) At the other extreme, we have held that regardless of internal corporate structure, there can be no conspiracy as long as only one corporation is involved. *(Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.* (9th Cir. 1969) 416 F.2d 71, 80-84.) The heretofore unanswered question is what, if any, limits should be and can be drawn on Section 1 conspiracies in the separate incorporation situation.

Antitrust law is concerned with the concerted action of distinct economic entities. In any case, whether

such action has occurred turns on the particular facts.[4] Separate incorporation is just one among many factors; it may be significant in an antitrust sense or it may be only a technicality, a byproduct of decisions with no antitrust impact. The corporate structure itself determines whether there are separate units or one entity. *(In re Penn Central Securities Litigation* (E.D. Pa. 1973) 367 F. Supp. 1158 (subsidiaries each covered a different geographical region); *I. Haas Trucking Corp. v. N. Y. Fruit Auction Corp.* (S.D. N.Y. 1973) 364 F. Supp. 868; *see also, Beckman v. Walter Kidde & Co., Inc.* (E.D. N.Y. 1970) 316 F. Supp. 1321, *aff'd* (2d Cir. 1971) 451 F.2d 593.)

DRI and BAPCO form a single unified structure. The relationship between them far exceeds DRI's mere ownership of the subsidiary stock, and therefore, this is not a case of parent and independent subsidiary, but of a single business unit separated only by the technicality of separate incorporation. The same individual, Sparks, is controlling shareholder of DRI, president of both corporations and publisher of all five newspapers. Both corporations

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[4]Some courts have decided that there was in fact no conspiracy between people even where the corporate units might have conspired. For example, one person may be the sole decisionmaker in two separate corporations so that there can be no conspiracy in the meeting-of-the-minds sense. (Windsor Theater Co. v. Walbrook Amusement Co. (D. Md. 1950) 94 F. Supp. 388, *aff'd* (4th Cir. 1951) 189 F. 2d 797.) On the other hand, two separate entities can conspire via a person who is a large shareholder or an officer in both corporations (America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc. (N.D. Ind. 1972) 347 F. Supp. 328.) In *America's Best Cinema,* however, the court recognized the antitrust significance of the economic units, as opposed to the people in charge of them.

have the same individuals in charge of important operations, such as circulation. The two alleged individual co-conspirators, Chilcote and Cleland, are employees and/or officers of both firms. All three daily newspapers have the same sports page, financial page, T.V. log, "Night and Day Around the Bay," editorial page (except for two editorials per week), and substantial amounts of news and advertising. All the composition work for the common features is done at one plant. Moreover, DRI and BAPCO do not compete or hold themselves out as competitors.[5] The lack of intraenterprise competition (or representations thereof) is not dispositive of the conspiracy issue, but it is an additional factor in our decision. Its importance is particularly evident in this case, where the corporations are horizontally related. Since a horizontal conspiracy would attempt to restrain inter-

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[5]The Court's suggestion in *Kiefer-Stewart* that commonly-owned firms who pretend to be competitors must act like competitors has created some confusion in the lower courts. The Fifth and Eighth Circuits have held that competition between the corporate units is not necessary for a finding of intraenterprise conspiracy. (Battle v. Liberty Nat'l Life Ins. Co. (5th Cir. 1974) 493 F.2d 39, 44; T.V. Signal Co. v. A.T.&T. (8th Cir. 1072) 462 F.2d 1256, 1260.) The Second and Third Circuits have refused to find an intraenterprise conspiracy when competition was lacking. (Ark Dental Supply Co. v. Cavitron Corp. (3rd Cir. 1972) 461 F.2d 1093, 1094-95, n.1; Beckman v. Walter Kidde & Co., Inc. (E.D. N.Y. 1970) 316 F. Supp. 1321, 1325-26, *aff'd* (2d Cir. 1971) 451 F.2d 593.) Subsequent to *Kiefer-Stewart,* the Supreme Court decided *Perma Life Mufflers.* There, the Court held that a conspiracy was possible despite the fact that the parent and subsidiary were vertically related and were not competing with each other. (Perma Life Mufflers v. Int'l Parts Corp. (1968) 392 U.S. 134, 141-142.) Last term, in United States v. Citizens and Southern Nat'l Bank (1975) 422 U.S. 86, the Court, in *dicta,* noted that "[t]his Court has held that even commonly owned firms must compete against each other if they hold themselves out as distinct entities." (*Id.* at 116.)

brand competition, the fact they do not compete and that plaintiffs have alleged no interbrand restraint strongly suggest there was no conspiracy.

Arguably on these facts the two corporate units were incapable of conspiracy as a matter of law. It is unnecessary for us to decide that question, however, because the same facts prevent successful attack on the district court's factual findings that there was no conspiracy.

II

A. *Horizontal Restraints.*

Even if the corporate units were capable of conspiring, plaintiffs have failed to show that the concerted action effected a horizontal restraint on trade. A termination is not unlawful because of some adverse effect on the distributor's business, even if the effect is the elimination of the distributor from the market. The complaining distributor must show that the refusal to deal was intended to or did bring about some restraint of trade beyond the loss of business suffered by the distributor or the market's loss of a distributor-competitor. (*E.g., Bushie v. Stenocord Corp.* (9th Cir. 1972) 460 F.2d 116, 119; *Ricchetti v. Meister Brau, Inc.* (9th Cir. 1970) 431 F.2d 1211, 1214.) Plaintiffs rely almost exclusively on *Industrial Building Materials, Inc. v. Interchemical Corp.* (9th Cir. 1970) 437 F.2d 1336. Industrial was an independent distributor of sealant products manufactured by Presstite. Presstite had a very strong position in the sealant market. Industrial

alleged that Presstite had tried to force it out of business by selling directly to Industrial's customers, making some sales below the wholesale price to to Industrial, and hiring one of Industrial's key sales people. Presstite argued that it could legally terminate Industrial if it chose to and therefore it could terminate it by competing. We reversed a summary judgment in favor of Presstite. We held that elimination of a competitor can be an unreasonable restraint when either (a) "unfair" predatory methods are used to force out the competitor, or (b) there is a market structure in which loss of a distributor will enhance a manufacturer's market power and tend to diminish the ability of other manufacturers to compete.

Plaintiffs proved neither of the elements which might bring them within *Industrial*. Predatory tactics usually have little or no social or economic justification, and can potentially harm the economy by producing monopolies. (*See* Turner, "Antitrust Policy and the Cellophane Case," (1956) 70 Harv. L.Rev. 281, 305.) The terminations here, however, were pursuant to a contract which gave either party the right to discontinue the relationship; there was no provision for compensation or for the sale of the distributorship and the exercise of the contractual right can hardly be deemed "unfair." Moreover, if plaintiffs' contention were accepted, a manufacturer could be prevented "from ever replacing a system of independent distributors with its own system of direct sales," a result that even *Industrial* did not endorse. (437 F.2d 1343; *see Cartrade Inc. v. Ford Dealers' Adv. Ass'n*

(9th Cir. 1971) 446 F.2d 289, 294.) Furthermore, any of DRI/BAPCO's solicitations after the initiation of suit, even if unfair, as alleged, are irrelevant; the relationship among the newspapers and the distributors was continued only to preserve the *status quo* during trial.

Plaintiffs also failed to prove that defendants' acts had any actual horizontal anticompetitive effect. Plaintiffs would have had to show DRI/BAPCO's dominant position in some relevant market[6] and an actual restraint within that market. Plaintiffs claim that the relevant market is community newspapers, which Sparks unquestionably dominated, as opposed to all newspapers. We do not think they had to produce a numerical value of the cross-elasticity of demand to show community newspapers is a distinct submarket. Proofs of the factors set out by the Supreme Court in *Brown Shoe v. United States* (1962) 370 U.S. 294, 325, would have sufficed; industry and public recognition, peculiar characteristics or use of product, distinct customers, distinct prices, and sensitivity to price change. Plaintiffs did not produce any evidence on these factors. Their reliance on defendants' admission that Sparks' papers must be priced below the four major Bay Area newspapers in order to compete tends to refute their premise; it shows substitutability and thus one market. Plaintiff's sparse argument leaves many questions unan-

[6]Lessig v. Tidewater Oil Co. (9th Cir. 1964) 327 F.2d 459 held "probability of actual monopolization" is not an essential element of proof in a Section 2 claim. In a Section 1 claim, however, market definition, as a prelude to showing restraint, is required. (Twin City Sport Service, Inc. v. Charles O. Finley & Co. (9th Cir. 1975) 512 F.2d 1264, 1274-75.)

swered. These include: To what extent does the news, sports and feature coverage of the community papers overlap with the coverage in the metropolitan and satellite-city papers? Do the non-community papers distribute local editions or have special sections for particular communities? What is the extent of penetration of the non-community papers in the town served by the Sparks' publications? Is there a significant number of readers who subscribe to both types of newspapers, or do consumers tend to choose only one type?[7] The answers to the questions will not produce a precise measurement of the cross-elasticity of demand, but they would provide the groundwork for a reasonable determination of the newspaper product market in the communities around the Bay. Only after that determination is made could a court draw any conclusions concerning the market dominance of DRI/BAPCO.

Finally, plaintiffs have been even less diligent in showing an actual restraint in that market. The district court found that no plaintiffs had ever carried a competing paper and two had declined an opportunity to do so. Moreover, plaintiffs failed to show that internal distribution costs are a substantial barrier to entry in the newspaper business, or that a demand for distribution services could not be met by independent entrepreneurs not currently in the newspaper distribution trade.

Since the plaintiffs have only shown that the terminations might restrain trade, but not that they actu-

[7]All of these questions relate to the sales of the newspapers. Similar factors would be important to the sale of advertising space—the other product market in which newspapers compete.

ally did, they are not entitled to reversal on this point.

B. *Termination in Furtherance of the Price Fixing Conspiracy.*

Plaintiffs claim that the terminations were made in order to eliminate the uncooperative dealers and permit DRI/BAPCO to continue to control the resale price of its newspapers. The price-fixing scheme involved two different resale prices: the distributor's price to carriers (indirectly restrained) and the carriers' price to subscribers (directly restrained).[8] As to the first, indirect restraint on the distributor's resale price, it is difficult to argue that the terminations were made to continue the restraint.[9] In the usual refusal to deal situations, termination or threat of termination is unlawful because it coerces the distributor to adhere to a fixed price. Elimina-

[8]In their complaint plaintiffs alleged two vertical restraints on trade: (1) the dealership agreements in effect from 1969 until the terminations, and (2) the carrier agreements used after the terminations. On appeal, they raise also the "combinations" between the publisher and (a) the street sale dealers and/or (b) the motor route distributors. We may not consider the new claims; they were not raised below and unlike *Perma Life Mufflers, supra,* note 5, where the Supreme Court permitted such a "shotgun" approach, this is not an appeal from a summary judgment but from a full-fledged trial and the district court's detailed findings of fact and conclusions of law. Moreover, these agreements and the carrier agreements go to Sparks' alleged continuation of the retail price fix after the illegal contracts were terminated. If they were in furtherance of the scheme, no additional "contract combination or conspiracy" need be shown. The dealership agreements were not raised on appeal.

[9]Trixler Brokerage Co. v. Ralston Purina Co. (9th Cir. 1974) 505 F.2d 1045, 1051; Bushie v. Stenocord Corp. (9th Cir. 1972) 460 F.2d 116, 119. *But cf.* United States v. Colgate (1919) 250 U.S. 300.

tion of a nonconforming dealer notifies all other dealers that adherence to the manufacturer's resale price will be enforced. Similarly, a threatened termination or a termination coupled with a resumption of the relationship (upon a distributor's expressed willingness to adhere to the resale price) effectively restrains the distributor from setting his own resale price.

In *Knutson,* however, there was no selective termination of miscreant dealers; the entire wholesale level of distribution was replaced by an employee system. Thus, the terminations did not further the restraint on the plaintiffs' resale price. Sparks did not merely threaten to convert in an attempt to coerce adherence to his price; after the full conversion, no distributor was being restrained. There is, of course, no question that DRI/BAPCO now controls the price at which papers are sold to the carriers; such control results from the vertical integration. But that control is exercised by any firm (*e.g.,* the other Bay Area newspapers) that performs its own distribution services.[10]

[10]The general legality of internal distribution creates the paradox of the case law on intrabrand restraints. The opinions in this area are often cast in terms of price competition in the sales of a single brand. Thus, a manufacturer cannot confine its independent distributors to a certain territory or fix their resale price, because these restraints determine the price at which the brand is sold. Yet, a manufacturer can assume full control over the price of his product, if he integrates forward into distribution and eliminates any possibility of intrabrand competition.

The reason for this "double standard" goes all the way back to Dr. Miles Medical Co. v. Park & Sons Co. (1911) 220 U.S. 373, in which the Court outlawed resale price maintenance because § 1 incorporated the ancient prohibition against restraints on alienation. Since this is the doctrinal basis of the *per se* rule against resale price maintenance, the rule is difficult to apply to cases where there is no "alienation."

The dealership agreements permitted termination by either party after proper notice; there was no restriction on the reason for termination. If one party believed, as Sparks did, that the relationship was no longer advantageous to him, he had complete freedom to terminate it, as long as the terminations did not perpetuate the violation. In *Germon v. Times Mirror Corp.* (9th Cir. 1975) 520 F.2d 786, the court held that a "termination might be enjoinable even if done pursuant to contract, if the contractual clause relied upon were being used to foster an unlawful competitive scheme." (*Id.* at 788.) Similarly, in *Noble v McClatchy Newspapers* (9th Cir. 1975) 533 F.2d 1081, 1086, we were willing to enjoin or award compensation for a termination if it were made because of a refusal to comply with territorial restrictions. In both cases, however, the issue before the court was the termination of a single distributor and the question was raised whether termination was being used as an enforcement mechanism for an unlawful restraint.[11] As to the restraint on the distributor's price, no such question arises in *Knutson;* a complete conversion is not an enforcement mechanism, but a choice of an alternative form of distribution.

As to the second price restraint, that on the retail price to subscribers, plaintiffs claim that the terminations were used to foster an anticompetitive scheme. They argue that Sparks eliminated the distributors so that his newspapers could influence directly the prices charged by the carriers and the remaining adult independents (motor route, retail account, and street sale dealers). Since the anti-competitive goal of the price-fixing scheme was to place a ceiling on the subscription price, the terminations could be in furtherance of the scheme if Sparks continued to unlawfully restrain the price of the newspapers.[12] That is, as long as there are permissible ways for Sparks to control subscription prices, an intent to control or actual control does not necessarily violate Section 1. If Sparks' post-termination dealings with the remaining independents are not violative of Section 1, then the terminations which facilitated those dealings were not in furtherance of a price-fixing conspiracy.

While the uncontested facts demonstrate Sparks' unalloyed intent to establish uniform prices for his newspapers, the totality of his actions does not amount to the requisite quantum of coercion: no "meaningful event depend[ed] on compliance or noncompliance" with his requests of the carriers. (*Butera*

[11]The *Germon* court also implied that terminations in retaliation for the antitrust action might be prohibited. (520 F.2d at 787.) Retaliation is difficult to find in *Knutson* since all distributors for both companies were terminated, not merely the plaintiffs. Moreover, the district court found that Sparks acted out of a real concern for maintaining a high level of circulation in order to keep his advertising revenues. (383 F. Supp. at 1362-63.)

[12]Because the issue is unlawful control *vel non,* the extended discussion by the district court (383 F. Supp. at 1362-65) and the defendants of the economic need for newspapers to maintain a low subscription price is not really in point. Resale price maintenenc is unlawul *per se* and *Albrecht* implicitly rejected newspapers' "dual market" (advertising and newspaper sale) position as a justification for maximum price fixing. (390 U.S. at 151-54.) Thus, while the economic imperatives of the newspaper business might explain why Sparks wanted to control (lawfully or unlawfully) resale prices, they do not affect the legality of the methods he used.

v. Sun Oil Co. (1st Cir. 1974) 496 F.2d 434, 437.) Although the new carrier contract makes no mention of a resale price, the carriers have been sent letters which "strongly recommend" reselling at the price suggested in the newspapers.[13] The letters also attempt to show a unity of interest between the newspapers and the carriers since the latter can profit from the former's promotional efforts, which are said to "depend on a uniform subscription price." The letter clearly states, however, that an offered bonus for each new subscriber does not depend on charging the suggested rate. Taken in its entirety, the letter does not amount to coercion, but relies on "individual self-interest to bring about general voluntary acquiescence." (*United States v. Parke, Davis & Co.* (1960) 362 U.S. 29, 46-47.)

[13]"NOTICE OF RATE INCREASE

"Effective August 1, 1975 the Publisher will increase the wholesale rate charged *Argus* carriers to \$2.92 per month. At the same time, the suggested subscription rate will be increased to \$3.75 per month.

"To prevent the loss of circulation and of carrier profits, the Published plans a massive promotion campaign based on the cooperative efforts of carriers, the circulation department and professional solicitors. The success of that campaign, and the ability of the office and the professional solicitors to help you build circulation on your route, depend on a uniform subscription price. We, therefore, strongly recommend that you charge your subscribers the suggested rate of \$3.75 per month.

"Last November when Mr. Benham became an employee at the *Argus*, the company reduced your monthly wholesale rate from \$2.54 to \$2.32 per subscriber, giving you a large increase in profit margin. We want you to continue earning those increased profits, so we plan to give you a bonus each month on every subscription you deliver. An employee of the company will contact you and your parents to explain the details of this program. Receipt of the bonus does not depend on your charging the suggested subscription rate, but—the more subscribers you have—the more bonuses you will earn.

"REMEMBER: *Increased circulation* is good for everybody and *means more profits for you!*"

The remainder of plaintiff's evidence of a continuing restraint is based on a theory of coercion-by-example. The terminations, the treatment of plaintiff-employees, and the decision not to employ most of the plaintiffs are said to be disciplinary measures that carry an ominous threat to independents who might be tempted to sell above the suggested price. Plaintiffs are suggesting that Sparks' treatment of the distributors satisfies the *Schwin* coercion standard of a "communicated danger of termination." (*United States v. Arnold, Schwinn & Co.* (1967) 388 U.S. 365, 372.) They have not, however, provided any evidence of direct communication concerning the potential fate of nonconforming independents; they rely exclusively on possible incidental effects of activities the district court found not to be independent violations. Moreover, plaintiffs overlook the fact that Sparks' initial response to the distributors' lawsuit was to integrate and offer employment to each distributor, including the plaintiffs. A communicated danger of employment does not yet qualify as coercion in the context of resale price maintenance.

Plaintiffs have thus failed to show coercion of the remaining independents and have, therefore, not proven that the terminations were in furtherance of a retail price-fixing scheme. Nevertheless, the events prior to, during, and after the trial have generated a substantial amount of confusion concerning the independents and the legitimate courses of action open to Sparks. While this potentially coercive "fall-out" does not justify an award to plaintiffs for the terminations, it might warrant the district court, if

it chose to do so, to require Sparks to inform each independent of his or her right freely to resell the newspapers at prices other than the suggested price. This would assure that there is no residual anti-competitive effect from the terminations without penalizing Sparks for his lawful actions.

III

Territorial Restrictions.

The distributors cite three factors to support their claim of an unlawful restriction on areas of resale. First, they argue that the territorial reference in the dealers' agreement was a contractual restraint of trade. Second, they point to four instances in which a plaintiff-distributor's territory was realigned (a "split"), pursuant to the contractual provision for renegotiation. In at least one case they claim that the split was foisted on the distributor against his will. Finally, they contend that the wholesale newspaper price was manipulated to discourage sales outside a distributor's assigned territory. The wholesale prices to distributors varied, depending upon what the publisher and distributor believed was a reasonable income for a route. Once an income figure was decided upon, a dual rate was used, with one price per subscriber up to a certain number of subscribers, and a higher rate for each subscriber beyond that. If a contract expressly prohibits sales outside a designated territory, it is unlawful whether or not coercive devices have been employed to enforce it. In the absence of an express contractual agreement, proof of coercion that the manufacturer is "firm and reso-

lute" in insisting on compliance with any ambiguous or implicit limitations on dealer freedom is necessary to show unlawful restraint. (*See United States v. Arnold, Schwinn & Co., supra,* 388 U.S. at 372.) In *Beverage Distributors, Inc. v. Olympic Brewing Co.* (9th Cir. 1971) 440 F.2d 21 (territorial and customer restrictions), we held that an exchange of letters stating the distributor's intention to restrict itself to manufacturer's approval was not a contract and supported a jury's finding that there was no effect to impose the alleged restraints. (*Id.* at 30.) In *Gray v. Shell Oil Co.* (9th Cir. 1972) 469 F.2d 742 (price fixing), there was no contractual restriction and the court framed the question as whether the distributor was deprived of his free choice by some affirmative conduct of the manufacturer. (*Id.* at 747.)[14]

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[14]This analysis of the issue has been accepted with some variations by four Circuits. The Second Circuit, in a pre-*Schwinn* price-fixing case applied it and held that in the absence of an express contract provision, there must be a course of conduct showing a restraint of the dealer's freedom. (Susser v. Carvel Corp. (2d Cir. 1964) 332 F.2d 505, 510.) After *Schwinn,* however, that court required evidence of firm and resolute enforcement despite an express contractual customer limitation. (Janel Sales Corp. v. Lanvin Parfums, Inc. (2d Cir. 1968) 396 F.2d 398, 400, 406-07.) The Tenth Circuit has recently followed *Janel* and held that a contractual provision clearly prohibiting sales outside a territory is not in itself a *per se* violation; firm and resolute enforcement must be shown. (Redd v. Shell Oil Co. (10th Cir. 1975) 524 F.2d 1054-58.) Although the Fifth Circuit, in *dictum* has set itself against the firm and resolute requirement, even in the context of implicit agreements (Copper Liquor, Inc. v. Adolph Coors Co. (5th Cir. 1975) 506 F.2d 934, 943), it has found such enforcement in the cases before it. (*Id.* at 944; Hobart Bros. Co. v. Malcolm T. Gilliard, Inc. (5th Cir. 1973) 471 F.2d 894, 900-901; Eastex Aviation, Inc. v. Sperry & Hutchinson (5th Cir. 1975) 522 F.2d 1299, 1307; Lehrman v. Gulf Oil Corp. (5th Cir. 1972) 464 F.2d 26, 38.) The First Circuit has also endorsed a requirement that there be enforcement measures in a case involving no contractual restriction. (Butera v. Sun Oil Co. (1st Cir. 1974) 496 F.2d 434, 437.)

Thus, when the contract is ambiguous, the inquiry must focus on the seller's conduct. Designations of areas of primary responsibility or mere suggestions of territory without an express prohibition do not, by themselves, constitute a violation. A reference to territory or primary responsibility, however, may transgress Section 1 if the plaintiffs can show a course of conduct by which the manufacturer has prohibited sales outside the territory. (*Hobart Bros., supra,* note 14, 471 F.2d at 899-900.) The manufacturer's enforcement efforts need not be a blatant coercion. A restraint is present if "some course of action is undertaken or threatened contingent on the willingness or unwillingness" of the distributor to adhere to the restriction; the action "must involve making a meaningful event depend on compliance or non-compliance." (*Butera, supra,* note 14, 496 F.2d at 437.)

The contracts in *Knutson* do not expressly prohibit extraterritorial sales.[15] They designate a district number, which publisher and distributor apparently understand to define a specific area, and provide that the dealer will be supplied "such quantities [of the newspaper] as he shall order [at certain rates] to supply the needs of his territory." As the district court recognized, this is a borderline case. (383 F. Supp. at 1368.) Although there is no express prohibition, there is a strong implication that a distributor is confined to a specific area. Nevertheless, the contract seems sufficiently ambiguous to necessitate a

[15]*See* note 1, *supra.*

determination whether the newspapers made efforts to enforce the implied restriction.

On its face, the dual price structure appears to be a device for confining a distributor to his assigned area. When a dealer took over a territory his wholesale price was calculated by the following method:

1. The number of subscribers in the area is multiplied by the subscription rate, giving the gross income produced by the area.[16]
2. The carriers' total income is subtracted from this amount, giving the remaining income to be divided between the newspaper and the dealer.
3. The newspaper and the dealer agree on a reasonable income from the area, taking into consideration the size, density, and difficulty of the area.
4. The remaining amount (the newspaper's income) is divided by the number of subscribers,

[16]Because the subscription rate was unlawfully fixed by the publisher, plaintiffs claim that the territorial set-up was ancillary to the price-fixing scheme, and thus *per se* unlawful. In *Schwinn,* the Court stated in *dicta* that territorial restrictions that are "part of a scheme of unlawful price fixing" are *per se* violations. (388 U.S. at 373, *citing* United States v. Sealy, Inc. (1967) 388 350.) In *Sealy,* the Court found that the exclusive territories gave each participant "an enclave in which it could and did zealously and effectively maintain resale prices, free from the danger of outside incursions." (*Id.* at 356.) The *Sealy* price fix, however, was a minimum price, which meant that exclusive territories protected each seller from competition by price cutters. The relationship between the maximum price fix and territoriality in *Knutson* is quite different. Exclusive territories inhibit the maximum price fix since they prevent control of the price by competitive forces. Thus, in *Albrecht,* the newspaper tried to encourage competition in the territory of a dealer who priced above the fixed maximum. (390 U.S. at 147-49.)

giving the first wholesale rate to the dealer, *i.e.*, the "base rate."

The base rate was initially charged for the number of subscribers in the territory at the time the territory was acquired. A higher rate was charged for each additional paper. Cleland testified that the reason for this was (1) to give a reasonable income to each dealer for his territory (the base rate calculations) and (2) to help the newspaper recover its circulation costs (the higher rate).

Whatever the newspapers' justification for the dual rates, charging a higher rate for newspapers above the amount needed for the territory inhibits extraterritorial sales. Not only does the dealer pay a higher price for additional papers, but he is also likely to to incur greater costs in acquiring and serving customers outside his territory. This profit squeeze, resulting from the dual rates, inhibits dealer sales beyond his assigned area.[17]

Nevertheless, the dual rate structure is not, by itself adequate to meet the restraint standard of making "a meaningful event depend upon compliance or noncompliance with the restriction." A similar situation

[17]Moreover, the system seems to be contrary to the publisher's interests. Since the volume of circulation is of critical importance to the newspapers' prime revenue source, advertising, one would expect incentives rather than disincentives to increased subscriptions. The inferences that can be drawn from this fact are limited, however, since distributors were not relied upon to generate new subscriptions. The profits of professional solicitors and carriers were not affected by the higher rate; these two groups (in conjunction with newspaper employees) were responsible for nearly all new subscriptions.

arose in *Butera, supra.* There, the oil company used a dual pricing system for sales to its dealers: the "tankwagon price" was the base rate, but a competitive allowance (*i.e.,* a price reduction) was given on gasoline sold in areas and at times when the local competitive situation required retail sales at a lower price. (496 F.2d at 435.) The company also varied its suggested retail price depending on the local conditions. The First Circuit refused to prohibit the practice as unlawful price fixing because " 'adherence to the suggested price [was not] the quid pro quo for . . . receiving [the] competitive allowances.' " (*Id. at* 437, *quoting Lehrman v. Gulf Oil Corp.* (5th Cir. 1972) 464 F.2d 26, 39.) Although the wholesale price structure clearly narrowed the range in which a dealer could price, the court refused to constrain the company's wholesale pricing decisions, as long as the wholesale prices were applied without regard to a dealer's adherence to the alleged restraint.

In *Knutson,* the dual price applied to all additional newspapers, whether sold within or without the territory. Of course, the initial determination of the break-point for the base rate was made on the basis of the number of subscribers within the territory, but the higher rate applied regardless of whether additional customers came from the territory or outside it.

The interaction between the splits and the dual prices is more problematic. As pointed out by the district court, the mere fact of a split does not show that territorial restrictions were imposed on the dealers. (383 F. Supp. at 1368.) Areas of primary

responsibility are as subject to realignment as exclusive territories. The question is whether a dealer was restrained from selling outside his area, whatever that area happened to be. When a dealer resists a split, however, and is coerced into accepting it, the realignment can be construed as forcing a distributor to cease sales in the area. It should be noted that once a split is effected, the carriers of the lost area are given to the new dealer and new subscribers secured by professional solicitors (hired by the newspapers) go to the new dealer. Since nearly all new subscribers are acquired by the carriers or the solicitors, after a split the new dealer is unlikely to continue any operations in the lost area.

Plaintiffs have not provided any substantial evidence of blatant coercion, such as a termination threat, to accept a split. Even in the one instance where the dealer actively resisted the split (1970, Knuston), plaintiffs do not seriously claim that Knutson succumbed because of threats. But defendants admit and the district court found that "whenever a split resulted in a loss of circulation, the dealer's rate was adjusted to avoid any loss of income of the dealer." After Knutson's 1970 split, his rates were favorably adjusted. (383 F. Supp. at 1368.) This admitted manipulation of the wholesale rate (and thus the dealer's income) comes perilously close to giving a *quid pro quo* for refraining from sales in a lost area. If plaintiffs had shown some sort of pattern in which rates were adjusted downward when dealers sought to sell outside their territories, the

Butera standard would probably be met. No such pattern has been shown. The contracts provided for renegotiation of the rates upon initiation by either party, and rates were at times lowered at dealers' request with no indication that territorial disputes were involved. The small number of total splits of plaintiff-areas (four) and the isolated instance of adjusting Knutson's rates when he resisted a split are inadequate to show an anticompetitive use of the dual rate structure. Although the system was clearly subject to abuse, plaintiffs have not shown that it was abused.

This is a very close case. It is undeniable that newspapers and dealers were operating under a system of territories; there is no evidence that any dealer attempted to sell outside his area prior to the suit. (383 F. Supp. at 1369.) But neither is there adequate evidence that these territorial divisions were imposed and enforced by the newspapers. It may be that the system was actually an implicit horizontal division of territories among the distributors or even a vertical-horizontal arrangement requiring a minimum of coercion from above. Each dealer had strong incentives to adhere to his territory, including ease of delivery and response to errors and reciprocal respect for territorial integrity from other dealers. Plaintiffs have chosen, however, to pursue a purely vertical theory and thus must show that they were restrained. In this they have failed. We conclude, therefore, that the district court's conclusion that the plaintiffs failed to prove that the territorial divisions were a part of the price-fixing scheme is unassailable on appeal.

IV.

Damages.

Plaintiffs claim damage due to lost profits.[18] After they had initiated this suit, the seven *Daily Review* distributors and two of the four *Argus* distributors raised their subscription prices. Because the trial on damages began on April 16, 1974, the largest new-price period considered by the lower court was six months (September 1, 1973 to February 28, 1974); plaintiffs state in their brief that further data is now available. The proof of damages is based on a comparison of dealer profits between this "after" period and the "before" period when the restraint was in effect (1969-73). The district court held that the evidence was inadequate to prove either the fact of damage, *i.e.,* that plaintiffs suffered some actual injury, or the amount of damage in a manner other than by speculation and conjecture. (383 F. Supp. at 1379.)

The district court found that the data for the "after" period was so "inherently suspect and patently artificial" as to destroy the probative value of the evidence. (383 F. Supp. at 1382.) Each *Daily Review* dealer increased his or her price in the first two months after the price restraint was removed. The increase yielded a higher profit per subscriber and a decrease in the number of subscribers. From these

[18]They also claimed loss of the going concern value of their dealerships and sought an injunction to enable them to continue in business. Since, as the district court found (383 F. Supp. 1384-89) and we affirm, the terminations, pursuant to a valid contract, were legal and did not further an antitrust violation, the plaintiffs were not entitled to any damages other than their profits lost during the period of the violation.

two figures, the *Daily Review* plaintiffs calculated a net increase in monthly income. This they multiplied times their number of months as a dealer to arrive at a total dollar amount of damages (ranging from $1,800 to $36,000). Plaintiffs claim that their estimates are conservative since not all of the circulation drop is attributable to the price increase and during the "after" period there were no attempts made to acquire new customers.

Two *Argus* dealers raised their prices on April 1, 1974, two weeks before the damage trial. Subsequent to the damage trial they filed affidavits giving the increased profits of their distribution businesses for the months of April and May. Despite the apparent availability of data for these two months in the "after" period, plaintiffs have used the average circulation loss of *Daily Review* dealers (15 percent) to calculate the two *Argus* dealers' net increase in profit for the "after" period. Plaintiffs state that the two *Argus* dealers did not raise their prices until April 1 (and did not claim damages after March 1, 1973) because from March of 1973 until February of 1974, the *Argus* suggested price was 25¢ higher than the *Daily Review* price. Since the *Daily Review* was home delivered in the district of the *Argus* dealers, they felt a price hike would lead subscribers to switch to the *Daily Review.*

Two of the remaining three *Argus* dealers made no price changes. The third increased his price on February 1, 1974. These three plaintiffs claimed damages based on a comparative study using the data of

the *Daily Review* dealers and the *Argus* dealers' assertion that the price in the "before" period would have been 25¢ higher had they been free of restraint. The ratio of 25¢ to the actual *Daily Review* price increases was multiplied by the average monthly damages of the *Daily Review* dealers to calculate the damage per subscriber month of these three *Argus* dealers. This figure was multiplied by the dealers' number of subscriber months prior to March 1, 1973, to arrive at a total damage figure.

Different standards govern proof of the fact and proof of the amount of damages. (*Story Parchment Co. v. Patterson Parchment Paper Co.* (1931) 282 U.S. 555, 562; *Flintkote Co. v. Lysfjord* (9th Cir. 1957) 246 F.2d 368, 390. *But see* Weinberg, "Recent Trends in Antitrust Civil Action Damage Determinations," 1976 Duke L.J. 485, at 495-96.) Proof of the fact of damage is closely intertwined with proof of causation. Thus in *Story Parchment, supra,* the Court held that "the natural and probable effect" of the antitrust violation was depressed prices, so that if earlier prices had been fair and reasonable a plaintiff could recover for the difference in price. (282 U.S. at 561.) (*See also Zenith Radio Corp. v. Hazeltine Research Inc.* (1969) 395 U.S. 100, 124-125; *Bigelow v. RKO Radio Pictures* (1946) 327 U.S. 251, 264.) A plaintiff need not negative all possible alternative explanations for his decline in profits, but the defendants may show that other events caused the injury. (*Zenith Radio Corp., supra.*) The plaintiff must prove some damage, but "proving the fact of damage

. . . is satisfied by . . . proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage." (*Zenith Radio Corp., supra,* (1969) 395 U.S. 100, 114 n.9.) Even as to this minimal quantum of injury, the standard is relaxed; otherwise, it would defeat the loose standard applied even to the amount of damages in antitrust cases. (*See Bigelow, supra,* 327 U.S. at 274 ("just and reasonable" damage estimates are permissible); *Flintkote Co. v. Lysfjord, supra,* 246 F.2d at 392.)

The Supreme Court has also established a relaxed standard for proving the amount of damages in an antitrust case once the fact of damage has been shown. In *Story Parchment,* the Court noted that where the violation makes difficult a certain determination of damages "it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." (282 U.S. at 563; *see also, Bigelow, supra,* 327 U.S. at 264.) More recently, the Court in *Zenith* emphasized the "practical limits" on the standard of proof of damages in antitrust cases. (395 U.S. at 123-25.) We followed and explained the reasoning of those cases in *Flintkote, supra,* 246 F.2d at 391:

> "A study of the adjudicated cases in this area readily dispels any impression that this question of damages is governed by an application of the common law rule of reasonable certainty. The cases have long since departed from this rule in antitrust litigation.
>
> . . .

> "Preliminarily, it should be observed that the reasons underlying the evolutionary trend toward liberality in proving damages are grounded in logic and sound policy. Two principal factors have influenced the courts. First, the self-evident intangible nature of the subject matter. To ascertain what would have been is as difficult as trying to determine what should be.
>
> . . .
>
> "Second, the legal maxim that a wrongdoer should not profit by his wrong. In light of the intrinsic uncertainty surrounding this problem, the responsibility for which lies in large measure with the defendant found liable, it has long been felt that this presents an ideal situation for application of that doctrine." (246 F.2d at 391.)

The district court found two major flaws in the plaintiffs' proof. First, it said that they did not show a reasonable probability that, absent the restraints, they would have raised their prices during the "before" period. While recognizing that the plaintiffs need not "prove that they actually engaged in the potentially futile act of violating a price-fixing agreement," the court characterized plaintiffs' proof as "conjectural hindsight." Second, the district court rejected the fact-of-damage proof on the ground that the plaintiffs did not meet the *Story-Flintkote* criteria. We agree with the district court in respect of the *Argus* plaintiffs, but we disagree as to the other plaintiffs.

The fundamental difficulty with the district court's reasoning is that it creates a nearly insurmountable

barrier to recovery in maximum price-fixing cases. A determination of what a dealer would have done is bound to involve speculation and "second-guessing." Even if plaintiffs had supplied the corroborating circumstantial evidence apparently sought by the trial judge, assertions of their past intentions would still entail "conjectural hindsight."

Rather than imposing the nearly impossible burden of proving what each dealer would have done if he had been free to make his own pricing decision, we assume that, absent evidence to the contrary, a dealer would have raised his prices had it been profitable to do so; that is, dealers are profit maximizers.[19] This assumption merely amounts to a recognition that a "restraint" in fact restrains. The defendants can attempt to show plaintiffs would have kept their prices beneath a maximizing point despite their violative behavior. Contrary evidence might include dealer testimony that he would not have raised his price, or a showing by the defendants that the dealers had reasons other than the restraint for selling below a profit-maximizing price.

With respect to the non-*Argus* plaintiffs, *Knutson* is easily distinguishable from *Story-Flintkote*. The distributors were operating the same businesses in

[19]In another case we employed another corollary of the assumption of profit-maximizing behavior. In Gray v. Shell Oil Co. (9th Cir. 1972) 469 F.2d 742, gasoline distributors claimed that the oil company's control over retail prices prevented them from raising their prices and realizing a higher profit. Citing evidence that dealer price hikes had resulted in a decrease in profits, the court held that the fact of damage was not proven. (469 F.2d at 749-50.)

both time periods and there was substantially less uncertainty as to the comparability of the two periods. The only question is the effect of a price increase on circulation and these plaintiffs have provided data on the degree of circulation drop. The district court implicitly recognized the differences between *Flintkote* and *Knutson* in that it did not address the comparability of the two periods, but focused on the reliability of the data from the "after" period. Yet, the factors upon which the court relied in finding unreliability, at least as to the *Daily Review* plaintiffs, are relevant to the amount rather than the fact of damage. In keeping with the dictates of *Story Parchment, Bigelow,* and *Zenith,* the *Daily Review* plaintiffs have shown that the reduced net profits were "precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause." (*Zenith, supra,* 395 U.S. at 125.) The district court found a contractual resale price restraint and plaintiffs produced evidence that despite circulation drops their net profits would have been higher in some amount. Although there are some infirmities in their evidentiary showing, unlike *Flintkote,* the infirmities are not so significant as to call into question the fact of damage, but relate only to the amount of damage.

In respect of the *Argus* plaintiffs, we agree with the district court that these plaintiffs did not meet the-fact-of-damage *Flintkote* test. Both groups of *Argus* dealers relied on overage *Daily Review* figures to compute their prices, and two of the *Argus* plaintiffs never raised their prices. Thus, the *Argus* dealers

produced no independent data, and they did not offer any proof of the comparability of the *Daily Review* and *Argus* dealerships and markets. Unlike other plaintiffs, the *Argus* plaintiffs had a complete failure of proof of damages, not simply some deficiencies in the proof of amount of damages.

On remand of the amount of damages issue as to the non-*Argus* plaintiffs, the district court is not asked to accept unreliable evidence.[20] Rather, the district court is to make factual findings as to the amount of damages as to which each non-*Argus* plaintiff has offered reliable evidence, having in mind that certitude is not required and that lack of certainty justifies scaling down the award but not total rejection. Defendants, of course, can offer proof that market conditions, intra- and inter-brand forces of competition, or other factors would also have scaled down the plaintiff's claimed loss of profits.

V

Section 2 Attempt to Monopolize

"The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so

[20] If the court does not believe that all plaintiffs would have immediately raised their prices in the same amount had the contractual restraint been removed, then it should draw reasonable inferences as to when and how much each plaintiff would have altered his or her price. If some plaintiffs' claimed monthly profit increases are excessive, then the damage award should be reduced to an account reasonably supported by the evidence. If the court is dissatisfied with plaintiffs' summaries of their operations, it may require that the supporting documents be submitted.

close as to create a dangerous probability of it." *(American Tobacco Co. v. United States* (1946) 328 U.S. 781, 785.) Although the completed offense of monopolization requires only a general intent to do the acts leading to a monopoly, "a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt." *(Times-Picayune v. United States* (1953) 345 U.S. 594, 626.)

In *Lessig v. Tidewater Oil Co.* (9th Cir. 1964) 327 F.2d 459, we rejected defendant's argument that proof of a dangerous probability of success requires an evaluation of a firm's economic power in the relevant market:

> "We reject the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize. Of course, such a probability may be relevant circumstantial evidence of intent, but the specific intent itself is the only evidence of dangerous probability the statute requires . . . .
>
> . . .
>
> "When the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not in issue.'" (327 F.2d at 474.) (Footnotes omitted.)

Despite the substantial criticism of *Lessig,* it is still the law of this Circuit to which this panel is bound. The sole issue, then, in this attempt case, is the presence or absence of a "specific intent to destroy competition or build monopoly." In *Lessig* itself, the court relied on the defendant's Section 1 violations

(resale price fixing and exclusive dealing) to support a possible inference of specific intent. *(Id.* at 475.) In *Bushie v. Stenocord Corp.* (9th Cir. 1972) 460 F. 2d 116, 121, we reemphasized the importance of a Section 1 violation in inferring the requisite specific intent. *(See also, Moore v. Jas. H. Mathews & Co.* (9th Cir. 1973) 473 F.2d 328, 332.) More recently, we reaffirmed and expanded on the *Lessig* formula:

> ". . . dangerous probability may also be shown through proof of specific intent to set prices or exclude competition in a portion of the market without legitimate business purpose. This specific intent must be accompanied by predatory conduct directed to accomplishing the unlawful purpose. Ordinarily specific intent is difficult to prove and will be inferred from such anticompetitive conduct." *(Hallmark Indus. v. Reynolds Metals Co.* (9th Cir. 1973) 489 F.2d 8, 12.)

In sum, we require (1) only specific intent and (2) some illegal (under Section 1) or predatory activity from which specific intent can be inferred. Where the conduct is justified by legitimate business reasons or merely exemplifies a healthy spirit of competition, an intent to monopolize is more difficult to support. The court below refused to find the requisite specific intent. The question, therefore, is whether the acts of the corporate and individual defendants require an inference of specific intent. We discuss each form of conduct separately, but it should be noted that all of the acts should be viewed together in determining whether there was an attempt to

monopolize. *(Morning Pioneer, Inc. v. Bismarck Tribune Co.* (8th Cir. 1974) 493 F.2d 383, 387.)

The district court held that the papers had violated Section 1 by fixing resale prices in their contracts with the distributors. *Lessig, Bushie,* and *Moore* all endorse the proposition that a Section 1 violation itself can support an inference of specific intent. The district court, however, refused to make the inference because there was no evidence of "predatory or knowingly unlawful activity" in the fixing of prices. The court characterized the illegal contracts as a "technical violation" and noted that the defendants took prompt action to comply with the law when notified by plaintiffs' counsel that the practices were unlawful. Assuming, *arguendo,* that there is a requirement of "knowlingly unlawful" conduct, there is no question that the defendants engaged in it. Price fixing has been illegal since the appearance of the Sherman Act in the nineteenth century; resale price fixing contracts were held to be illegal as early as 1911 in *Dr. Miles;* maximum resale price fixing was clearly outlawed in *Kiefer-Stewart* in 1951; and maximum resale price fixing specifically in the newspaper industry was found to violate Section 1 in *Albrecht* in 1968, the year before DRI/BAPCO adopted its illegal contracts. In the light of these cases beginning with the definition of the general offense of price fixing and culminating in the specific offense in the specific industry at issue in *Knutson,* the district court's determination that there had been no knowingly unlawful activity cannot stand. Even in the absence of predatory acts, the contracts themselves are unlawful and they accomplished the unlawful purpose of maintaining a maximum resale price.[21]

During the period from 1944, when he bought the *Daily Review,* until 1972, Sparks and his corporations bought 11 local newspapers and throwaways, six of which no longer exist.[22] The mere fact that Sparks purchased numerous newspapers does not in itself lead to an inference of an intent to acquire a monopoly. But Sparks was not a diminutive Hearst; he did not build a kingdom of noncompeting newspapers in different areas. The papers acquired in 1945, the 1950's, 1962, 1965, and 1970 were all distributed in the *Daily Review* home delivery area. The 1972 acquisitions were competitors of either the *Daily Review,* the

[21]Moreover, the specific offense of maximum resale price fixing could be used to destroy (or exclude) competition or build a monopoly. If the fixed maximum price is higher than cost but lower than a price that would permit new entrants or smaller scale competitors to operate *(i.e.,* a "limit price"), then, although not predatory, it could support other efforts to acquire a monopoly.

[22]The list of Sparks' acquisitions is as follows.

1944 —Sparks purchases *Daily Review* ("DR")

1945 —Sparks purchases *San Lorenzo Sun Journal* and converts it to a weekly insert in the DR

1950's—Sparks purchases the *Castro Valley Reporter* and converts to weekly insert in DR

1962 —DRI purchases the *Argus*

1965 —DRI purchases BAPCO and thus acquires the *Livermore Herald and News* (new *Tri-Valley Herald*)

1970 —BAPCO purchases *Village Pioneer* (now *Tri-Valley News*)

1971 —DRI purchases *Fremont News Register* and *San Leandro Morning News.* Both papers eliminated, subscribers now served by either DR or *Argus*

1972 —DRI acquires three free weekly newspapers, publication discontinued and replaced by the *Daily Review Shopping News.*

Argus, or the *Daily Review Shopping News.* Three advertising throwaways were purchased in 1972 and then discontinued, thus leaving the *Shopping News* without their competition. Moreover, the 1972 purchases included a covenant that the seller corporation and its stockholders would not compete for a period of 10 years in the DRI/BAPCO areas of operation. Finally, BAPCO was acquired for \$300,000, only \$20,000 of which could be allocated to the physical assets; the *Village Pioneer* was acquired for \$3,000, but all that was acquired was "the name," and the name was later changed; and the 1972 papers were purchased for \$800,000, one-half of which was the price of the covenant not to compete. Sparks' history of purchasing competitiors for prices greatly out of proportion to the value of their tangible assets provides support for, but does not compel, an inference of specific intent.

The Audit Bureau of Circulation ("ABC") is a non-profit corporation which issues statments on its members' circulation and distributes the statements to advertisers and publishers who rely on the data for the sale and purchase of advertising space. Prior to the periodic determinations of circulation by the ABC, DRI would sponsor promotional contests in which dealers purchasing additional copies of newspapers for a specified time would be rewarded with trips or cash. The additional purchases would be recorded as paid circulation even if the dealers were unable to acquire new subscribers to purchase the papers. The "prizes" awarded for these contests were not reflected

on the dealer's monthly statements as credits, nor were the ABC auditors informed of the contests. Plaintiffs also alleged that employees of DRI had set up a system of phony start orders whereby dealers would write (for a fee) start orders for nonexistent subscribers. Professional solicitors were also alleged to have participated in this scheme.

These uncommendable tactics might have anticompetitive effect because new entrants might be discouraged by the false impression that market strength of DRI would prevent successful entry. But an inference is also permissible that high circulation would actually attract competition into what was falsely presented as an especially juicy market. This factor thus becomes a neutral element in the search for the requisite specific intent.

In short, the Section 1 violation alone, or in conjunction with Sparks' newspaper acquisitions, the questionable promotional practices, and the padding of circulation figures would have supported a district court finding a specific intent, but that finding was not compelled and we cannot say that the district court's contrary determination was clearly erroneous.

The injunction is ordered dissolved upon issuance of mandate. Affirmed in part, reversed in part, and remanded for further proceedings consistent with the views herein expressed. The parties shall bear their own costs on appeal.

SMITH, District Judge (concurring and dissenting):

I would affirm.

I think that the trial court's findings of fact are sufficient and are supported by the evidence. The trial court here simply did not believe the plaintiffs' witnesses. The trial judge considered the plaintiffs' interests and motives in the case; the lack of corroborating evidence; the plaintiffs' self-contradictions; the times at which the claims here made were first made.[1] The court concluded:

> . . . Because of the paucity and doubtful credibility of the evidence on this question, plaintiffs have not satisfied their burden of proof on the first element of the fact of damage . . . .
>
> *Knutson v. Daily Review, Inc., supra* note 1, at 1381.

Absent believable witnesses, the plaintiffs who did have the burden failed unless their burden of proof was satified by the operation of some rule of law.

Perhaps that rule of law is stated by the majority in these words:

> Rather than imposing the nearly impossible burden of proving what each dealer would have done if he had been free to make his own pricing decision, we assume[2] that, absent evidence to the contrary, a dealer would have raised his prices had it been profitable to do so; that is, dealers are profit maximizers. This assumption merely amounts to a recognition that a "restraint" in fact restrains . . . (Footnote 19 of the majority opinion is deleted, and footnote 2 of this dissent is added.)

[1]Knutson v. Daily Review, Inc., 383 F.Supp. 1346 at 1379-81 (N.D. Cal. 1974).

[2]The use of the word "assume" is new in the nomenclature of the law relating to the *onus probandi*.

I am not aware of any rule of law which permits appellate courts to make assumptions of fact. An appellate court may create presumptions, even the mandatory kind which bind the trier of fact in the absence to the contrary. Although the opinion does not say so, that seems to be what the majority has done here. If so, then I disagree. I think it could be said that it is the universal intention of dealers to make a profit but that there is an intent to profit does not warrant the conclusion that all dealers are in fact "profit maximizers," *i.e.,* that they will do all things necessary to make a maximum profit. Here the effect of the presumption is that the dealers, if free, would have considered raising prices as a means of increasing profits, would have taken the trouble to do so, would have risked the effect of a raise in prices in a competitive market, and the possibility that the publishers might have retaliated by raising their prices to the dealers.

The fact is that some dealers do not do all things necessary to maximize profits. That is why some dealers profit much less than others, and some go broke. Between the intent to profit and the production of a maximum profit lie the factors of energy, imagination, intelligence, and the willingness to take a risk. If the presumption created here goes as far as it

must go to support the conclusion, then, in my opinion, it is artifical. I think the testimony in this case discloses the artificiality of it.[3]

To sum it up: I think the trial court did not believe plaintiffs' witnesses. I think that, in the absence of credible evidence, there was no rule of law compelling the trial court to find that the loss of profits had been proved.

[3]*See* Knutson v. Daily Review, Inc., *supra* note 1, at 1379-81.

Appendix "B"

United States District Court
Northern District of California

C-73-1354-CBR

Douglas K. Knutson, et al.,
Plaintiffs,
vs.
The Daily Review, Inc., a corporation, et al.,
Defendants.

[Filed September 23, 1974]

MEMORANDUM OF OPINION

Plaintiffs in this antitrust action are independent dealers who purchase, distribute and resell daily newspapers, *The Argus* and *The Daily Review,* in various areas located in Alameda County.[1]

Defendants are two corporations and several individuals. The Daily Review, Inc. ("DRI") is a California corporation organized on November 10, 1953, with its principal place of business at Hayward, Cali-

[1]Plaintiffs Douglas K. Knutson, Arlen N. Benham, Geoffrey Beaty, Daniel A. Dutra, and Laura Duarte are *Argus* dealers, and plaintiffs Evan Francis Williams, Joseph W. Berthiaume, Kenneth W. Jackson, Jean E. Nyland, Willard B. Kittredge, Robert A. Dutra, and Gayle C. Ely are *Daily Review* dealers.

fornia. DRI publishes *The Argus, The Daily Review,* and *The Daily Review Shopping News,* a weekly free shopper. Bay Area Publishing Co. ("BAPCO") is a California corporation organized on June 8, 1960, with its principal place of business in San Francisco, California. BAPCO conducts most of its business at Livermore, California, where it publishes the *Tri-Valley Herald* ("Herald") and the *Tri-Valley News* ("News"). BAPCO is a wholly owned subsidiary of DRI. None of the plaintiffs herein has any relationship, contractual or otherwise, with BAPCO. Floyd L. Sparks is the controlling shareholder of DRI, the president of DRI and BAPCO, and publisher of *The Argus, The Daily Review,* the *Herald,* and the *News.* William Chilcote is the business manager of DRI. Dallas Cleland is the director of circulation of *The Argus, The Daily Review,* the *Herald,* and the *News.* John Clark is the assistant circulation manager of *The Daily Review* and promotion manager of *The Daily Review, The Argus,* the *Herald,* and the *News.* Carl Felder, doing business as Felder Enterprises, is an independent contractor engaged in the solicitation of subscribers for newspapers, including those involved in this case.[2]

Plaintiffs have alleged four separate claims for relief, all of which arise under the Sherman Act. First, plaintiffs claims that the provision in their written dealership agreements with the publisher ("Dealer's Agreement"), in effect between December 1, 1969, and

[2]On March 15, 1974, the Court dismissed the action as to defendants Carl Felder and Felder Enterprises pursuant to Rule 41(b), Federal Rules of Civil Procedure.

September 1, 1973, which requires the dealer to sell the newspaper to the individual subscriber at a price fixed by the publisher (in effect, the resale-resale price) constitutes a vertical price fixing agreement in violation of §1 of the Sherman Act, 15 U.S.C. §1. Second, they alleged that the unilateral termination provisions of the Dealer's Agreement as well as the other restraints on plaintiff's ability to sell their businesses and the actual termination of plaintiffs and all other home delivery dealers as of September 1, 1973 amount to unreasonable restraints of trade in violation of Sherman Act §1. Third, plaintiffs claim that the territorial restraints imposed upon them in the Dealer's Agreement are unlawful under Sherman Act §1. Fourth, plaintiffs allege that defendants have attempted and conspired to monopolize the publication of community daily newspapers in the southern Alameda County area in violation of §2 of the Sherman Act, 15 U.S.C. §2. The complaint prays for preliminary and permanent injunctive relief under §16 of the Clayton Act, 15 U.S.C. §26, and for treble damages, costs, and attorney's fees under §4 of the Clayton Act, 15 U.S.C. §15.

The parties have stipulated and the Court finds that the business involved in this case is either in or substantially affects interstate commerce. The requisite interstate commerce being present, this Court has jurisdiction under 15 U.S.C. §§15 and 26.

I. The Newspapers

The Daily Review is published daily, in the afternoon Monday through Saturday, and in the morning

on Sunday. It circulates in Hayward, San Leandro, Fremont, Newark, Livermore, and elsewhere in southern Alameda County. Approximately seventy-five percent of its average paid circulation is within the "City Zone," which as defined by the Audit Bureau of Circulations ("ABC") consists of the corporate limits of Hayward and Union City plus the balance of the Hayward Census Division, Castro Valley Division, and San Leandro Division including that part of San Leandro City comprising Census Tracts 33, 34, 35, 42, 43, and 44. Along with others newspapers, *The Daily Review* is legally adjudicated to carry advertising required by law for transactions within the cities of Hayward and San Leandro, and it is the only newspaper adjudicated to carry legal advertising originating with the political entities of the cities of Hayward and San Leandro. Printed in Hayward, *The Daily Review* has twenty-eight full-time and ten part-time reporters and sixteen advertising salesmen.

The Argus is a morning seven-day daily newspaper circulated in Fremont, Newark, Union City, and elsewhere in southern Alameda County. Approximately ninety percent of its average paid circulation, as reported by ABC, is located within the cities of Fremont and Newark. It is legally adjudicated along with other newspapers to carry legal advertising for transactions within Fremont and Newark, and it is the only paper adjudicated to carry legal advertising originating with the political entities of the cities of Fremont and Newark. *The Argus* is printed in Livermore and employs fifteen full-time reporters and eight advertising salesmen.

The *Herald* (formerly the *Livermore Herald & News*) and the *News* (formerly the *Village Pioneer*) both circulate in the Livermore Valley. The *Herald* is a seven-day morning daily while the *News* is a three-day per week, controlled circulation[3] afternoon paper. Approximately ninety-five percent of the average paid circulation of these papers is within the Primary Market Area consisting essentially of Livermore, Pleasanton, and Dublin, all in Alameda County, and the community of San Ramon in Contra Costa County. The *Herald* and the *News* share with other papers the adjudication for legal advertising within the cities of Livermore and Pleasanton, but they are the only newspapers adjudicated to carry legal advertising originating with the political entities of those two cities. These two papers are printed in Livermore and employ fourteen full-time reporters, five part-time reporters, and eight advertising salesmen.

The following portions of *The Daily Review, The Argus,* the *Herald,* and the *News* are identical; sports page, financial page, editorial page except for one editorial on two days during the week, T.V. log, "Night and Day Around the Bay," and substantial amounts of news and advertising. All of the composition work for these publications is done in Hayward.

II. The Independent Dealer System

This case focuses on the independent dealer system used by the Sparks' publications and the publisher's

[3] A controlled circulation newspaper is one which is distributed on a voluntary collection basis, i.e., the home subscriber may choose whether or not to pay the subscription price when called upon by the carrier.

attempt to change from that distribution system to one composed of employee dealers ("district managers") and independent carriers. In approximately 1950 Sparks adopted the independent dealer system for distribution of *The Daily Review*. Thereafter this system was used for distribution of each daily newspaper acquired by Sparks or DRI so that in May, 1973, all daily newspapers published by companies owned or controlled by Sparks were distributed to home-delivery subscribers through independent dealers and independent carriers.

Under this distribution system each dealer, including plaintiffs here, purchased his copies of *The Argus* or *The Daily Review* from DRI and resold them for his own account to independent carriers—boys and girls under the age of 18. These carriers, in turn, resold the newspapers to home-delivery subscribers. Each dealer was engaged as an independent contractor pursuant to the terms of a written dealership agreement, not as an employee of DRI. Upon purchase of the newspapers each dealer had complete ownership of, possession of, and dominion over the papers. DRI did not reimburse a dealer for unsold copies, and the dealers had to sustain all losses from carrier defalcations. Each dealer owned such equipment as was necessary for the distribution of the newspapers to the carriers. No dealer under contract to DRI ever paid anything of value to obtain his dealership or carrier organization. These independent dealers derived their profit and paid their expenses from the difference between the price at which they

sold the newspapers to their carriers and the price at which they purchased the papers from DRI. Rather than being uniform, however, the base rate charged by DRI for the papers varied among the dealers so that each dealer's income would be commensurate with the size, density, and difficulty of delivery of his territory. By this means it was intended that each dealer would be able to earn an income which would fairly compensate him for his time and effort expended. This dealer income figure was reached jointly by the dealer and the publisher and then used, along with the set subscription price, the carrier's income (e.g., 57 cents per subscriber per month after October 1, 1969, for *The Daily Review*) and the number of subscribers, to calculate the base rate for the newspaper for each dealer.[4]

Prior to December 1, 1969, DRI used a standard form of dealer's agreement which provided that the dealer would sell newspapers to the subscribers within his route or territory at a fixed subscription price and that the subscription price, the price paid to the publisher by the dealer, and the size and boundaries of the territory were subject to change by the publisher in his sole discretion. The dealer could not assign,

[4]Actually the Dealer's Agreement contained a dual rate structure in which the dealer paid his base rate for all papers ordered up to a certain number and then a second and higher rate for any extra papers ordered. For example plaintiff Williams' agreement dated January 15, 1973 (Exh. 3) provided that the dealer would pay for his newspapers at the rate of $1.632 per subscriber per month up to and including 1,550 subscribers and at the rate of $1.88 per subscriber per month for all subscribers over 1,550. Nyland's rates as of the November 1, 1972 agreement, on the other hand, were $1.68 up to 1,400 subscribers and $1.88 for any additional subscribers. (Exh. 4.)

transfer, or hypothecate rights arising under the agreement without the prior written consent of the publisher. A dispute arose whether under the terms of this agreement certain *Herald* and *News* dealers were independent contractors or employees of the publisher. As a result of this dispute, DRI, with the assistance of the Western Newspaper Industrial Relations Bureau, adopted a new Dealer's Agreement which went into effect on December 1, 1969, and governed the relations between DRI and BAPCO on the one hand and *Daily Review, Argus, Herald,* and *News* dealers on the other until September 1, 1973. That agreement provided in pertinent part:

> "That the Company will sell to the Dealer such quantities of Daily Review [Argus, etc.] as he shall order * * * to supply the needs of his territory or route * * *.
>
> * * * *
>
> "That the Dealer will sell the Daily Review [Argus, etc.] at the current subscription rate to his individual subscribers and cause same to be delivered to them each date of publication in a manner consistent with the best interests of both parties to this agreement. That the rate at which the Dealer sells to accounts for resale will be set by himself or through negotiations between himself and the account.
>
> * * * *
>
> "That should the Dealer decide to transfer his rights under this agreement to another party, he will duly advise the Company of this intent sixty (60) days prior to transfer. The Dealer agrees, however, that he will first ascertain that prospective transferee is bondable, has the qualifications and ability necessary to perform all responsibilities under this agreement, to the satisfaction of the Company. The Dealer agrees not to turn territory over to successor until he is fully trained and able to assume responsibilities to the satisfaction of the Company, accounts have been properly audited to permit an orderly transfer with mutual financial protection for parties concerned, and a contract has been executed with the new Dealer.
>
> "That either party hereto may terminate this agreement in its entirety upon the giving of thirty (30) days advance notice to the other party or less if mutually agreeable."

During the life of this agreement, all of the independent dealers, including plaintiffs, complied with its terms without any actual or threatened coercive action by the publisher. Prior to September 1, 1973, the *Daily Review* dealers uniformly sold the paper, through their carriers, to subscribers at the publisher's suggested home delivery subscription rate of $2.75 per month, the rate which was ineffect between October 1, 1969, and February 1, 1974, when the suggested subscription price was increased to $3.25 per month. Sales to subscribers by *Argus* dealers were also at the publisher's suggested price.[5] Moreover, when the publisher announced an increase in the *Argus* monthly home delivery rate, effective March 1, 1973, from

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[5]There were two instances of carriers in plaintiff Knutson's organization charging more than the "current subscription price" established by DRI for *The Argus*. After being informed of the overcharge by the *Argus* circulation manager, Knutson corrected the error and gave the customers a credit in the amount of the overcharge.

$2.50 to $3.00, all of the dealers acquiesced in this change and uniformly charged the higher rate. On five occasions during the last four years the boundaries of four dealers' territories were realigned, or "split." Again these dealers voluntarily acquiesced in these realignments. At no time prior to May 14, 1973, did any dealer request defendants' consent to transfer, assign or sell his dealership nor has any dealer, including plaintiffs, before or after September 1, 1973, either purchased or sold a dealership of any the newspapers involved in this litigation.

III. Termination of the Independent Dealer System and Subsequent Events

On May 14, 1973, counsel for plaintiffs wrote a letter to Sparks which alleged that certain provisions of the Dealer's Agreement then in force constituted anticompetitive trade practices and impinged on plaintiff's status as independent contractors. Specifically, the letter alleged that the following practices established by the Agreement were anticompetitive: resale price maintenance under which the publisher set the rate at which the carrier sold the paper to the subscribing public; the existence of non-uniform rates at which plaintiffs purchased the newspapers from the publisher; territorial restrictions on the dealers; and potential confiscation of the dealer's property rights in his business by means of the thirty-day cancellation provision. This letter suggested that plaintiffs were willing to negotiate a settlement rather than engage in litigation. No response to the merits of these charges were made either by the defendants or

their counsel who represented them at that time nor was a reply ever made to plaintiffs' counsel's second letter on this subject dated July 12, 1973.[6]

In a letter dated July 25, 1973, defendants DRI and BAPCO notified all of their respective independent newspaper dealers of the termination of their Dealer's Agreements effective at the close of business on August 31, 1973. The letter indicated that the entire distribution system was being changed from the use of independent dealers to distribution "through the medium of our employees." In the letter Sparks explained that "[t]his action is necessary to obtain closer supervision over our circulation, and in particular over efforts to increase such circulation. In our area we face intense competition from such larger paid circulation newspapers as the Oakland Tribune, the San Francisco Chronicle, and the San Jose Mercury-News and additional competition from free distribution newspapers. Any loss in circulation to these or other competitors would adversely affect our advertising revenue." (Exh. 1-C.) The termination letter offered employment as a salaried district manager to each terminated dealer. The letter indicated that as employees the district managers would be covered by such federal and state programs as workmen's compensation, Social Security, unemployment insurance,

[6] Counsel initially retained by defendants apparently took no action for two months. Defendants thereupon retained a second labor counsel who realized the antitrust implications of the May 14, 1973, letter. Subsequently present trial counsel was retained by defendants. By this recitation the Court does not imply that there has been any failure on the part of present trial counsel to represent defendants both promptly and diligently.

unemployment compensation disability insurance, and any other programs or benefits required by law. In addition, the employment offer included Blue Cross health insurance, paid vacations and holidays, and a profit sharing plan. Potential district managers were offered a salary of $265 per week (approximately $13,780 annually) and reimbursement for the use of their motor vehicles at the rate of 13¢ per mile.[7]

On August 6, 1973, plaintiffs filed this action and a hearing on plaintiffs' motion for preliminary injunction was set for August 14, 1973. The parties sought and obtained a continuance of the hearing on that motion on several occasions. The motion was finally withdrawn when the parties agreed to a birfurcated trial on the merits with the liability portion of the trial to begin on November 13, 1973. During this period defendants agreed to continue selling newspapers to plaintiffs at the prevailing rate and to hold open the offer of employment pending the Court's decision.

After the trial on liability began as scheduled, the parties agreed to a stipulated "temporary injunction" on December 13, 1973. Defendants were thereby enjoined from refusing to sell *The Daily Review* or *The Argus* to any of the plaintiffs at his present rate, from communicating except in a specified manner

[7]The salary paid DRI district managers was increased in December, 1973, to $275 per week ($14,300 annually). Moreover, under the new system district managers would not have to work on weekends and therefore would work fewer hours per week than they had as independnet dealers.

with any of plaintiffs' carriers or subscribers about the lawsuit or plaintiffs' prices, and from insulting, harassing or intimidating any of the plaintiffs, their carriers or subscribers until the end of the month in which the court rendered its decision on the liability issues. Plaintiffs were enjoined for the same period of time from insulting, harassing or intimidating any of the defendants, their employees or agents, from refusing to provide normal and reasonable distribution service including timely delivery of newspapers and inserts, and from permitting minor children of plaintiffs from entering defendants' plant or premises except for business. It was further agreed and ordered on that date that defendants' offer of employment would remain open until the end of the month in which the Court decided the liability issues, that the defendant newspapers could refuse to hire any plaintiff solely on the grounds of a failure properly to perform his duties, that such refusal could be referred to a designated arbritrator, and that no dealer would be denied employment based on his vigorous participation in the lawsuit.. The trial continued until February, 1974. The parties thereafter filed proposed Findings of Fact and Conclusions of Law. Final argument in the liability phase was heard on March 11 and 12, 1974. The Court announced its decision orally and in open court on the last day of argument finding defendants liable under the first claim. The trial on impact and damages began on April 16, 1974, and continued on April 17-19 and 22-25, 1974. The parties then filed proposed Findings of Fact, Conclusions of Law, and post trial memoranda. Final argument was

heard on June 17, 1974. The stipulated "temporary injunction" remained in effect throughout the damage phase of the litigation.

Since September 1, 1973, defendants have had a mixed distribution system. On that date sixteen districts of *The Daily Review* were converted from an independent contractor dealer/independent carrier operation to an employee/independent carrier system under which the carriers contract directly with the publisher.[8] In all of these districts as well as those in which *Argus, Herald,* and *News* dealers became employees, the independent carriers have continued to charge the advertised subscription price for the newspaper at all times to date. Plaintiffs have continued as independent dealers pursuant to defendants' agreement and subsequently to the stipulated temporary injunction.

[8]While the distribution system has been in a state of flux because of the change in counsel and the pendency of this case, as of the date of trial the street sales (vending machine), motor route and retail accounts dealers of *The Daily Review* have remained as independent contractors even though they were given the same notice of termination as plaintiffs received. Williams Felder, a street sales dealer, has remained as an independent contractor apparently under the terms of the Dealer's Agreement even though he signed a statement on July 30, 1973, accepting employment with DRI. Two motor routes formerly serviced by dealers who became employees were taken over by two indivduals who signed Dealer's Agreements. These Agreements have not yet been signed by DRI, although the new dealers were led to believe that the Agreements would be signed by DRI. The street sales dealers for *The Argus*, the *Herald*, and the *News* also received termination letters but have remained as independent contractors. Since they sell directly to the public the street sales and motor route dealers occupy the same level in the distribution chain as the carriers.

Between September 1, 1973, and November 1, 1973, seven plaintiffs increased their prices of *The Daily Review* to their carriers and pursuant to their suggestion their carriers raised the subscription price above that advertised by the publisher. When each such price increase occurred, all professional solicitation for new customers in that district ceased although such solicitation continued in the districts of the employee dealers (district managers). While defendants attempted to persuade these independent solicitors to solicit new subscriptions within the plaintiffs' districts at the new prices specified by the dealer, these solicitors were reluctant to solicit at different prices and when they attempted to do so experienced some confusion and disruption among their staff of solicitors. Defendants encouraged solicitation in plaintiffs' districts because about one third of the total circulation of *The Daily Review* is located within those districts, but defendants were careful to instruct the solicitors to solicit only at the dealer's price in order to avoid any accusation that defendants were trying to coerce the dealers' pricing policy or injure their business. To that end Cleland prepared a list of streets located within the districts of price-raising dealers and told the professional solicitors that if they were going to solicit in those areas it had to be at the dealer's suggested price. Defendants did not attempt to prevent their professional solicitors from soliciting at the dealer's price within the price-raising dealer's districts nor have defendants attempted to interfere in any way with plaintiffs' dealerships during the pendency of this action.

IV. The Alleged Antitrust Violations

A. *Vertical Price Fixing*

Plaintiffs' first claim for relief asserts a *per se* violation of §1 of the Sherman Act, 15 U.S.C. §1. Citing *Albrecht v. Herald Co.,* 390 U.S. 145, *rehearing denied,* 390 U.S. 1018 (1968), plaintiffs contend that the Dealer's Agreement provision which requires them (through their independent carriers) to sell the newspapers at "the current subscription rate," which is set by the publisher, amounts to a vertical price fixing agreement. Defendants concede that this contract provision is an agreement to maintain the resale price of the newspaper, but they contend that in the absence of actual coercion of the dealers by the publisher, such agreements to maintain resale prices do not constitute vertical price fixing agreements and therefore should be judged under the rule of reason rather than by the *per se* standards applied generally in price fixing cases. While defendants do not cite any cases which specifically require coercion as an element in an illegal vertical price fixing arrangement, they argue that actual coercive conduct has been found and relied upon in those cases which hold such vertical price fixing arrangements to be *per se* illegal. Defendants contend that since there is no evidence of coercive conduct by any of the defendants in this case, the holding of those *per se* cases do not control the outcome here.

It is true that in finding liability in *Albrecht* the Supreme Court did refer to the strong evidence of coercive conduct by the publisher in that case. *Albrecht v. Herald Co., supra* at 149-150. Similarly, in

Dahl v. Hearst Corp., 1973 Trade Cas., ¶74,322 (C.D. Cal. 1972), the court concluded that the defendant publisher's actions in response to plaintiff's resale price increase amounted to "coercive tactics and threats designed to force Dahl to require his carriers to sell the Herald-Examiner at the resale prices fixed by defendants in violation of Section 1 of the Sherman Act." *Dahl v. Hearst Corp., supra* at p. 93,488. In both of those cases the dealers had actually increased their resale price, and the publishers had responded by taking action to force the recalcitrant dealer into line or out of business. In the instant case there has been no such coercion; in fact, plaintiffs and all other dealers acquiesced in the fixed retail price throughout the life of the Dealer's Agreement in question.

While the coercion found in *Albrecht* and *Dahl* does not exist here, both of those cases lacked a significant element which is clearly present in this case, namely, an agreement in the form of a written contract which on its face places control of the resale price in the hands of the publisher.[9] Sherman Act §1

[9]In *Dahl* the court made the following finding of fact:

"8. At no time has Dahl made an agreement or contract with Hearst stipulating to the price at which he resells the Herald-Examiner to his carriers or the price at which the Herald-Examiner shall be sold the home subscriber by his carriers." *Dahl v. Hearst Corp., supra* at p. 93,486.

While it is not apparent from the Court's opinion, there was no contract fixing the resale price in *Albrecht.* An amicus brief filed in that case and cited to this court by plaintiffs' counsel during closing argument clearly indicates that there was no contract fixing the resale price in that case. The publisher had merely issued a "written price policy." *Albrecht v. Herald Company,* 367 F.2d 517, 519 (8th Cir. 1966), *rev'd,* 390 U.S. 145 (1968).

prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade * * *." 15 U.S.C. §1. The courts in *Albrecht* and *Dahl* relied upon the coercive conduct of the publisher in order to find an illegal "combination" to fix retail prices between the publisher and those who complied with or acquisced in his wishes. *Albrecht v. Herald Co., supra* at 149-150; *Dahl v. Hearst Corp., supra* at 93,488.

This same reasoning underlines the result in *United States v. Parke, Davis & Co.,* 362 U.S. 29 (1960). In that case a pharmaceutical products manufacturer announced a resale price maintenance policy in its wholesalers' and retailers' catalogues. No actual contract fixing the resale price was entered into by the wholesalers or retailers. When several retailers advertised and sold Parke Davis vitamin products substantially below the suggested minimum retail prices, Parke Davis instituted a program to obtain compliance with its suggested prices. As part of that program Parke Davis advised the wholesalers that not only would it refuse to sell any Parke Davis products to wholesalers who did not observe the catalogue prices but also that it would refuse to sell to wholesalers who sold Parke Davis products to retailers who did not follow the suggested minimum prices. The wholesalers expressed their willingness to comply. All the retailers were similarly advised, but when several retailers continued to sell below minimum prices, their names were supplied by the manufacturer to the wholesalers who then refused to fill those

retailers' orders. When charged with a violation of the Sherman Act, Parke Davis argued that the facts showed nothing more than a unilateral announcement of policy regarding resale prices followed by a simple refusal to deal with those who disregarded that policy, conduct which is lawful under *United States v. Colgate & Co.,* 250 U.S. 300 (1919). The Court disagreed:

> "In thus involving the wholesalers to stop the flow of Parke Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act." *United States v. Parke, Davis & Co., supra* at 45.

Where, as here, there is an express or implied agreement which places control of the retail price in the hands of the manufacturer or publisher, a search for such combinations by coersive conduct become irrelevant. Where, in the context of such vertical relationships, title, dominion, and risk with respect to the goods in question have passed to the dealer, the price fixing agreement, whether express, tacit, or implied, is itself illegal. *Dr. Miles Medical Co. v. Park & Sons Co.,* 220 U.S. 373, 398-400, 407-408 (1911); *United States v. Parke, Davis & Co., supra* at 45 n.6; *United States v. Bausch & Lomb Co.,* 321 U.S. 707, 721 (1944). "[T]he long-accepted rule in §1 cases [is] that resale price fixing is a *per se* violation of the law whether done by agreement or combination." *Albrecht v. Herald Co., supra* at 151 (footnote

omitted). Here there is such an agreement in the form of a written contract, and it is a *per se* violation of §1 even though it fixes the maximum rather than the minimum resale price, *ibid.* at 152-153; *Kiefer-Stewart Co. v. Seagram & Sons,* 340 U.S. 211, 213, *rehearing denied,* 340 U.S. 939 (1951) and even though the agreement is between a single supplier and his many dealers. *Albrecht v. Herald Co., supra* at 152 n. 8.

B. *The Terminations*

In their second claim for relief plaintiffs contend that DRI and BAPCO have combined and conspired to deprive plaintiffs of their contract right to transfer and sell their newspaper distribution businesses[10] and to appropriate and convert those businesses, including the distribution organizations, subscribers and good will of each business, to defendants' own use without just compensation. This deprivation and appropriation allegedly occurred when, pursuant to the thirty-day termination clause in the Dealer's Agreement,[11] defendants terminated their entire independent dealer system for home delivery thereby preventing plaintiffs from realizing the asserted value of these businesses by sale or transfer either to the publisher or to a third party who desired to enter the distribution

[10]Plaintiffs contend that the dealer's proprietary interest in his business and his right to transfer that interest were recognized by defendants when specific transfer provisions, not found in the old Dealer's Agreement, were added to the Dealer's Agreement of December 1, 1969. For the text of the transfer clause see pp. 52-53, *supra*.

[11]For the text of the termination clause see p. 53, *supra*.

business as an independent contractor. Plaintiffs assert that this combination or conspiracy had both an anti-competitive purpose, namely to increase the publisher's control over the subscription price of his newspapers, and the anti-competitive effects of depriving the public of an independent competitive level in the distribution of these newspapers and depriving plaintiffs of the market value of their business. Relying on *Industrial Bldg Materials, Inc. v. Interchemical Corp.,* 437 F.2d 1336, 1342 (9th Cir. 1971), plaintiffs argue that because of these anti-competitive effects and purpose the combination or conspiracy which resulted in their terminations is an unreasonable restraint of trade in violation of §1 of the Sherman Act. In their complaint plaintiffs apparently advance the additional contention that the termination and transfer provisions of the Dealer's Agreement were themselves so restrictive that on their face these provisions unreasonably restrained the transfer of dealerships in violation of §1 of the Sherman Act. This assertion was not stressed at trial, however; nevertheless the Court will address this contention briefly below.

Defendants' response is twofold. First they take the position that there can be no combination or conspiracy here between DRI and BAPCO since the decisions to terminate about which plaintiffs complain were made by only one individual, Sparks, the common president and controlling owner of these two corporations, who made independent decisions for each corporation. At worst, defendants contend, the

proof demonstrates nothing more than conscious parallelism which by itself does not establish an illegal combination or conspiracy. *Theatre Enterprises v. Paramount,* 346 U.S. 537, 540-541 (1954); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71, 84-85 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062, *rehearing denied,* 397 U.S. 1003 (1970); *Independent Iron Works, Inc. v. United States Steel Corp.,* 322 F.2d 656, 661 (9th Cir.), *cert. denied,* 375 U.S. 922 (1963). Second, defendants contend that the change in the distribution system was effected for the valid business reason of avoiding any antitrust violation which might have existed in the Dealer's Agreement while maintaining as much influence over the subscription price as the law would allow. Given the interrelationship of subscription price, circulation, and advertising revenues, defendants assert that the change in distribution system and the attendant terminations were reasonable actions.

The Court finds that since Sparks alone made the decision to change distribution systems and terminate all independent dealers for both DRI and BAPCO,[12] there was no combination or conspiracy between DRI and BAPCO to restrict plaintiffs' transfer rights and appropriate plaintiffs' businesses. The Court also finds that even if there had been the requisite combination or conspiracy, plaintiffs have not established by a preponderance of the evidence that defendants'

[12]See November 30, 1973, Reporter's Transcript (hereafter Tr.), pp. 3-4. Inexplicably the Reporter's Transcript in this case does not have common or uniform pagination. Often, but not always, the numbering of the pages would start at the beginning of each trial day.

change of distribution system which resulted in the termination of plaintiffs' independent businesses was, in the circumstances of this case, an unreasonable restraint of trade. Nor have plaintiffs proved that the transfer and termination provisions of the Agreement themselves unreasonably restrained trade.

In their effort to establish the combination or conspiracy required as the basis of a Sherman Act §1 violation, plaintiffs contend that any time the common owner or any responsible common executive of more than one corporation makes the same decision at the same time for each of those corporations that decision-making act establishes the necessary concerted action. As authority for this proposition, plaintiffs cited during final argument *United States v. Yellow Cab Co.,* 332 U.S. 218 (1947); *Timken Co. v. United States,* 341 U.S. 593 (1951); *Kiefer-Stewart Co. v. Seagram & Sons,* 340 U.S. 211, *rehearing denied,* 340 U.S. 939 (1951); and *Perma Mufflers v. Int'l Parts Corp.,* 392 U.S. 134 (1968). With respect to the issue of common ownership, these cases merely hold that common ownership and control do not immunize corporation from the impact of the antitrust laws in cases where a contract, combination or conspiracy has already been or could be established on other grounds, such as the actual agreement in *Timken,* the statements and conferences indicating the common design and understanding in *Kiefer-Stewart,* or the allegations of actual conspiracy taken as true on the motion to dismiss in *Yellow Cab.* None of these cases is support for the proposition that common

ownership alone establishes the existence of the requisite combination or conspiracy. The better rule, and the one which this Court adopts ,is that relied upon in *Windsor Theatre Co. v. Walbrook Amusement Co.,* 94 F.Supp. 388, 396 (D.Md. 1950), *aff'd,* 189 F.2d 797 (4th Cir. 1951), where the district court held that since there was "no evidence that the activities of the two defendant corporations were directed or caused by any one other than Thomas Goldberg who was the president and chief executive of both corporations", there could be no "meeting of two or more minds" and therefore no conspiracy between the two corporations. Plaintiffs here have presented no evidence other than Sparks' decision, such as the active participation of other corporate officers or agents in this decision, which would support a finding that DRI and BAPCO combined or conspired to violate §1, and therefore, plaintiffs' second claim for relief fails to satisfy one of the essential elements of Sherman Act §1.[13]

Assuming *arguendo* that a combination or conspiracy did exist, plaintiffs have nonetheless failed to prove by a preponderance of the evidence that either the transfer and termination clauses in the Dealer's Agreement or the actual terminations under the circumstances of this case were unreasonable restraints

[13]In their first claim plaintiffs also alleged a horizontal combination or conspiracy between DRI and BAPCO to fix the wholesale price of newspapers. That allegation rested solely on the actions and decisions of Sparks as common owner of both corporations, and therefore, it too fails for lack of sufficient proof of a combination or conspiracy between the two corporations.

of trade.[14] Plaintiffs rely heavily on *Industrial Bldg. Materials, Inc. v. Interchemical Corp.,* 437 F.2d 1336 (9th Cir. 1971), which is, they contend, "[t]he leading case" on the question of conversion from independent dealer to direct distribution and "closely analagous to the instant case * * *." Plaintiffs' Trial Brief, p. 22. That reliance, however, is not well placed.

In *Industrial,* defendant Interchemical Corporation's Presstite Division (Presstite) bypased its formerly exclusive distributor, Industrial, and distributed its sealing products directly to Industrial's customers thereby competing with and eventually eliminating Industrial as a distributor. The case is replete with allegations of price discrimination and unfair practices used by Presstite to lure customers away from Industrial. In framing the precise issue to be decided, the court noted that "[i]n this case * * * there is an allegation that Presstite, instead of merely refusing to deal with Industrial, sought to drive it out of business by unlawful means." *Industrial Bldg. Materials, Inc. v. Interchemical Corp., supra* at 1341. Presstite had competed directly with its own distributor, and the court relied on that fact to distinguish those cases which held that a manufacturer is free to agree with others to replace a distributor: "In each of those cases, however, the manufacturer did not enter into competition with the distributor, and there was no removal of a competitor

[14]Plaintiffs' allegation that the transfer and termination provisions are themselves unreasonable restraints of trade must be considered irrespective of the existence of a combination or conspiracy since these provisions appear in the Dealer's Agreement itself, clearly a "contract" for §1 purposes.

of the manufacturer from the market." *Ibid,* at 1342. Unlike Presstite, defendants here engaged in no predatory conduct directed against the dealers and never intended to compete against their own dealers by instituting a mixed system for home delivery circulation involving both independent dealers and employee district managers.[15]

The court in *Industrial* was also concerned about the allegation that Presstite had monopoly power over the Industrial sealant industry. This allegation was, in the court's view, at least sufficient to raise the likelihood of a restraint on trade in Presstite products. Yet plaintiffs here have not established nor have they attempted to establish with precision either the relevant market or defendants' position in that market.[16] As a result, the Court cannot rely here on

[15]To the extent that DRI and BAPCO now have such a mixed distribution system, it is the product of the stipulation and order pending the outcome of this lawsuit, and the existence of the current arrangement has no relevance to the question of the purpose and effect of the employee system which was to have gone into effect on September 1, 1973.

[16]While plaintiffs contend that the relevant product and geographic markets are community or suburban daily newspapers in specified areas of southern Alameda County where defendants publish the only community daily papers, the Court finds that this asserted market definition fails to take into account the cross-elasticities of demand among the community, satellite and metropolitan daily newspapers which circulate in southern Alameda County as well as the other media (television, radio, and free and controlled circulation papers) which compete for advertising in that area. *See United States v. duPont & Co.,* 351 U.S. 377, 393-400 (1956); *United States v. Grinnell Corp.,* 384 563, 571-576 (1966); *Plastic Packaging Materials, Inc. v. Dow Chemical Co.,* 327 F.Supp. 213, 229-230 (E.D. Pa. 1971); *United States v. Chas. Pfizer & Co.,* 246 F.Supp. 464 (E.D.N.Y. 1965). (Although these are Sherman Act §2 cases where, at least for a monopolization claim, market definition is an essential element of proof, the standards for market definition enunciated in these cases serve as relevant guidelines here as well).

the inferential anticompetitive effects of dominant market power as did the court in Industrial.

Thus plaintiffs have failed to establish in this case any of the three factors—unfair tactics, direct competition by the manufacturer with his distributor, or dominant market power—on which the court in *Industrial* relied when it reversed the summary judgment which had been entered in defendant's favor on the §1 claim. Moreover, that court specifically reserved the precise question before this court, namely, whether the antitrust laws preclude "a manufacturer from ever replacing a system of independent distributors with its own system of direct sales and of soliciting customers on its own." *Industrial Bldg. Materials, Inc. v. Interchemical Corp., supra* at 1343.

The authorities cited by defendants persuade the Court that a manufacturer does not violate the antitrust laws simply by discontinuing his dealings with a particular distributor. "Thus, a manufacturer may discontinue a relationship, or refuse to open a new relationship for business reasons which are sufficient to the manufacturer, and adverse effect on the business of the distributor is immaterial in the absence of any arrangement restraining trade or competition." *Ricchetti v. Meister Brau, Inc.,* 431 F.2d 1211, 1214 (9th Cir. 1970), *cert. denied,* 401 U.S. 939 (1971). A manufacturer can lawfully agree with a third party to give him an exclusive distributorship even if this means cutting off another distributor. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., supra* at 76. To hold otherwise would be to saddle

forever a manufacturer or supplier with the services of a particular distributor. *Cartrade, Inc. v. Ford Dealers Adv. Ass'n,* 446 F.2d 289, 294 (9th Cir. 1971), *cert. denied,* 405 U.S. 997 (1972). Nor is a manufacturer forever bound to use the same system of distribution when sound business considerations suggest that a different method be used. Thus, a manufacturer can lawfully terminate an independent distributor and thereafter sell exclusively through its own outlets. *Bushie v. Stenocord Corporation,* 460 F.2d 116 (9th Cir. 1972); *Ark Dental Supply Co. v. Cavitron Corp.,* 461 F.2d 1093 (3d Cir. 1972) (decision of defendants, a parent and its subsidiary, to sell their products, only through the parent's sale division, thereby excluding sales by independents such as plaintiffs, did not violate §1 of the Sherman Act).

The defendants sought to make just such a change in their distribution system, and they merely exercised their contractual right to terminate the dealers to effect that change. Nevertheless *Bushie v. Stenocord Corporation, supra,* and the other authorities which permit terminations are not dispositive of the instant case since each one permits such terminations only so long as there is present no anticompetitive intent or not resultant effect which unreasonably restrains trade. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd. supra* at 76-80; *Bushie v. Stenocord Corporation, supra* at 119-120; *Alpha Distrib. Co., Inc. v. Jack Daniel Distillery,* 454 F.2d 442, 452 (9th Cir. 1972); *Cartrade, Inc. v. Ford Dealers Adv. Ass'n, supra* at 293; *Ricchetti v. Meister*

Brau, Inc., supra at 1214. See also *Chisholm Brothers Farm Equipment Co. v. International Harvester Co.,* No. 71-3012 (9th Cir., May 17, 1974), p. 9. Therefore the Court must look to the particular facts of this case to determine whether or not the instant contract provisions or the terminations of plaintiffs which occurred pursuant to DRI's decision to change its entire distribution system were unreasonable restraints of trade either because defendants had an anticompetitive purpose or because the actions themselves had unreasonable anticompetitive effects. This analysis of the reasonableness of the particular restraint in question, "includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the retraint and its effects, and the history of the restraint and the reasons for its adoption." *United States v. Topco Associates,* 405 U.S. 596, 607 (1972); *Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918).

Turning first to the contract provisions themselves,[17] plaintiffs have failed to prove that the transfer and termination provisions were based on an anticompetitive purpose or had actual anticompetitive effects. Although interstate commerce is affected by the publication, distribution, and sale of the newspapers in question, it is not clear that the transfer of a local newspaper dealership from one individual to another within the same locality has any effect, must less a " 'not insubstantial effect' ", on interstate commerce. *Cf. Cartrade, Inc. v. Ford Dealers Adv.*

[17]See p. 52, *supra.*

Assn, supra at 292-294. Even if such an effect is assumed, the evidence in this case does not support a finding that these provisions violate §1. These clauses are actually less restrictive than those contained in the Dealer's Agreement in effect prior to December 1, 1969.[18] Rather than resulting from an anticompetitive intent, the change to the new language was made to insure the dealer's rights to transfer his contractual interest and thus to confirm the dealer's status as an independent contractor. Given the publisher's legitimate concern for the quality and speed of service provided by his dealers, the restrictions on transfer which enable the publisher to verify the character and financial responsibility of the transferee and the termination provision which enables either party to extricate himself from an unsatisfactory situation cannot be said on the basis of the record in this case to have had such anticompetitive effects that they constitute unreasonable restraints of trade.

Plaintiffs' more substantial allegation is that the actual terminations of their dealership violated §1 because they were motivated by an anticompetitive purpose and because they had the following anti-

[18]That agreement provided in pertinent part:

"That he [the dealer] will not assign or transfer or hypothecate this agreement or any rights thereunder or interest therein without the written consent of the Company first given, it being expressly understood that any attempt to effect such an assignment or transfer or hypothecation without such consent shall create no rights in the person to whom the same shall be made, and shall constitute grounds for immedate concellation and termination of this agreement at the option of the Company."

competitive effects: (1) elimination of distributors who are independent of the publisher; (2) appropriation of the fair market value of plaintiffs' businesses without compensation which leaves plaintiffs without the financial ability to continue in business as distributors of other newspapers; and (3) further strengthening of defendants' already dominant market position.[19] The Court finds, however, that plaintiffs have failed to prove by a preponderance of the evidence that defendants had such a purpose or that the changeover had such anticompetitive effects.

On the basis of the entire record in this case the Court finds that the wholesale distribution system of defendants' newspapers was not changed for the anticompetitive purpose of maintaining or extending unlawful control by defendants over the subscription price of their newspapers. Sparks testified that the new system was adopted to eliminate the practices

[19]While these are the very effects which concerned the court in *Industrial Bldg. Materials, Inc. v. Interchemical Corp., supra,* the inquiry into the existence of an unreasonable restraint of trade in these circumstances is primarily a factual one. *Alpha Distrib. Co., Inc. v. Jack Daniel Distillery, supra* at 452. Each case must be decided on the basis of its facts rather than by means of the automatic application of labels taken from previous cases. "[I]t should be remembered that this Court has often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied." *Maple Flooring Assn. v. United States,* 268 U.S. 563, 579 (1925); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., supra* at 78-79. Because *Industrial Bldg. Materials* was based on facts not found in this case, see pp. 69-71, *supra,* the automatic application of the anticompetitive effects noted in that case in order to find liability here clearly would be improper.

which had been claimed to be unlawful to enable the publisher to remain competitive by maintaining flexibility in his operations as possible and as much influence over the circulation of the newspapers as the law would permit. (November 16, 1973, Tr., pp. 139-141, 146.) Having observed Sparks during the trial and after careful evaluation of his credibility, the Court is satisfied that his decision to convert the distribution system was an honest effort to adopt a distribution plan which would be commercially sound and which would comply with the antitrust laws. This conclusion is reinforced by the fact that defendants sought to convert all of their home-delivery dealers to employees; defendants did not merely terminate a few errant dealers as punishment for their failure to adhere to defendants' pricing policy. *Cf. Albrecht v. Herald Co., supra; Dahl v. Hearst Corp., supra.*

Defendants' newspapers derive their revenues both from the sale of newspapers and from the sale of advertising. Generally, revenues from advertising are more significant than those from newspaper sales, and newspaper owners, in developing an over-all business strategy, are much more interested in the profitable flow of advertising revenue than in circulation revenue. Defendants' newspapers clearly conform to this pattern since they derive approximately 88% of their revenues from advertising and approximately 12% from circulation.

The advertising revenues of a newspaper are, of course, a function of the quantity of advertising space purchased by advertisers which in turn is influenced

by the following factors among others: (a) price of advertising, (b) circulation, (c) quality of newspaper product, (d) availability of run of press color, and (e) level of advertising selling effort. The first two of these factors, price of advertising and circulation, are the most important since advertisers are chiefly concerned with the cost to them per relevant exposure to potential buyers. Advertisers have access to statistics in the form of audit reports, surveys and representations from certain media concerning the percentage of households in given areas reached or claimed to be reached by each newspaper, television or radio station, and magazine. This rate of penetration, determined largely on the basis of circulation within a specific geographic area in the case of newspapers, along with the per inch cost of advertising space is of paramount importance to advertisers in their purchasing decisions.

Circulation, and hence the newspaper's rate of penetration, may vary with the subscription price of the newspaper. Circulation generally will decrease after an increase in the subscription price unless the publisher or someone else reallocates his resources in order to influence or control such a result, for example, by increasing expenditures for the solicitation of new subscriptions or increasing the quality of the product. Assuming that such a reallocation cannot be profitably undertaken or that it is ineffective, circulation will decline when the subscription price increases and advertising demand will therefore decline resulting in a reduction of the advertising space car-

ried by the newspaper. This reduction will make the newspaper less desirable to subscribers which in turn will decrease circulation and lead to a further loss of advertising demand. Dr. Rosse, a well-qualified expert in the field of newspaper economics testified that as a result of this process, a publisher, such as defendants here, whose revenues are derived approximately 88% from advertising and 12% from circulation could expect a loss of total revenue in the vicinity of 40% if the subscription price for 100% of his circulation were increased by 10%. (February 12, 1974, Afternoon Tr., pp. 27-30.) While the court does not adopt the precise figures contained in this testimony, it does find that there is an interrelationship between loss of circulation and advertising revenue. The precise effect on total revenue of any particular increase in the subscription price will depend on the amount of the increase and the percentage of the circulation which is selling at the increased price. For these reasons the publisher is vitally concerned with the subscription price because of its integral relationship to the whole revenue structure and ultimate profitability of the newspaper. The publisher is also interested in having a uniform subscription price since that uniformity facilitates the promotion of circulation and avoids hostility toward the newspaper from subscribers who are paying more for the paper than are other subscribers.

The profits of independent dealers are derived, on the other hand, solely from circulation. They have no direct financial interest in the advertising revenue

received by the publisher and derive no income from such advertising payments. These independent contractors have little, if any, knowledge about or interest in the overall revenue structure of the newspaper or the effects which an increase in the subscription price will have on the other operations of the newspaper, such as advertising space, editorial quality of the paper or quantity of news and features. While they are, no doubt, concerned about the general economic welfare of the newspaper, the independent dealer's paramount interest is in maximizing his own profits which are derived exclusively from circulation. Thus an increase in the subscription price may ultimately reduce the publisher's profits, even though such an increase may increase an individual dealer's revenue and profits. Even if circulation declined, the resulting reduction in a dealer's overhead might enable him to maintain a steady profit with less effort on his own part. Thus the publisher's and the dealer's attitudes toward the subscription price are not parallel and under some circumstances may be directly in conflict.[10a] Moreover, since the additional revenues generated by dealer-initiated price increases are retained by the dealer, the publisher has no additional revenue for financing his efforts to intensify promotional activities in order to maintain his circulation and advertising revenue at a constant level.

In the San Francisco Bay Area, the defendant newspapers are properly categorized as suburban newspapers. However, since the Bay Area is a

[10a]In the long run, however, their interests tend to coincide.

metropolis which includes a major city, two so-called satellite cites, Oakland and San Jose, each with its own metropolitan newspaper, and many suburban communities, defendant newspaper compete with metropolitan newspapers, satellite city newspapers and neighboring suburban newspapers. Defendant newspapers compete for circulation and advertising with the *Oakland Tribune, San Francisco Chronicle, San Francisco Examiner, San Jose Mercury-News* (*Argus* only), *Contra Costa Times, Valley Times, Pleasanton Times, Valley Pioneer, Alameda County Observer, The Friday Observer, The Dollar Saver,* preprints, circulars and direct mail advertising printed and distributed by advertisers and potential advertisers within the areas of circulation of defendants' newspapers. Defendant newspapers may also be competitive for both public attention and advertising dollars, with a number of commercial and noncommercial television and radio stations and many national, regional and local magazines. All of these media and others penetrate defendants newspapers' area of circulation.[20]

Defendants Sparks and Cleland testified that there appears to be no economically feasible alternative to home delivery of daily newspapers containing current news, entertainment, and advertising features in urban areas other than by independent contractor carriers, who receive considerably less than the minimum wages the law would require if such carriers were

[20]See Exhs. FF-4, FF-5, FFF, and KKK. *But see* 82 Harv. L.Rev. 319, 320-322 (1968).

employees. In their opinion carrier-delivery is essential to the maintenance of home delivery.

In light of these circumstances, Sparks' decision, made on or about July 15, 1973, for both DRI and BAPCO, to terminate all independent contractor wholesale dealers and transfer their functions to company employees cannot be said to have been made for the anticompetitive purpose alleged by plaintiffs. The Court finds credible Spark's testimony that his decision was made to ensure that his businesses were in full compliance with the law and to maintain simultaneously the greatest degree of influence which the law would allow over all aspects of the circulation of the newspapers, including not only influence over the subscription price but also over the frequency of publication, method of payment, type of distribution (paid, controlled or free), etc. Sparks desired influence in these areas in order to meet the competition to and preserve the financial integrity of the newspapers. The fact that the new system was based, in part, on defendants' belief that adolescent carriers would be less likely to deviate from the publisher's suggested price does not constitute sufficient proof of an intent to continue a resale price-fixing policy. Instead it supports defendants' position that the new system would be viable without resort to price fiixing or coercion. First, the subscription price is less important to the young carriers who do not depend for their entire livelihood on their paper routes, and, second, the magnitude of the impact upon circulation resulting from a deviation by an individual carrier

with his relatively small number of papers would be far smaller than that caused by an independent dealer's price increase.[21] The new contracts in effect between the carriers and the newspapers contain no reference to the subscription price, and there is no credible evidence that since September 1, 1973, defendants have done anything more than suggest a subscription price to the carriers. On the basis of the evidence herein the Court finds that the change in distribution system was not motivated by an anticompetitive purpose but rather was implemented for the purpose of terminating the previous system whose legality had been challenged.

The existence of a sound business reason however is not enough to avoid an antitrust violation. "The antitrust outcome does not turn merely on the presence of sound business reason or motive * * * [O]ur inquiry cannot stop at that point. Our inquiry is whether, assuming nonpredatory motives and business purposes and the incentive of profit and volume considerations, the effect upon competition in the market place is substantially adverse. The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct. It is only if the conduct is not unlawful in its impact in the market place or if the self-interest coincides with the statutory concern with the preservation and promotion of competition that protection is achieved." *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 375

[21]See Sparks, November 30, 1973, Tr., p. 33; Cleland, November 13, 1973, Tr., p. 166.

(1967); *Anderson v. American Automobile Association,* 454 F.2d 1240, 1246 (9th Cir. 1972). Plaintiffs' allegations of anticompetitive impact, or effect on the market place, however, have not been established by a preponderance of the evidence.

Plaintiffs have failed to prove that there was, in fact, actual intrabrand competition among the independent dealers as to price or service. On the contrary, the parties have stipulated that at no time prior to September 1, 1973, did any of plaintiffs' carriers charge more for home delivery than the subscription price advertised by the publisher. More significantly, even after September 1, 1973, there has been no competition among plaintiffs with respect to price or territory except for a few isolated instances where one dealer placed a vending machine in the territory of another dealer. Even without the independent wholesale dealers, subscribers are protected from overreaching by the publisher by the fierce competition for advertising revenues which are based upon circulation. Thus in order for the publisher to maximize his circulation he must keep the subscription price as low and the delivery service as good as possible. There is also active competition for circulation from other newspapers and other news media.

While the counsel argued that independent dealers can be used to distribute competitive newspapers, plaintiffs have never demonstrated a willingness or desire to provide such distribution. Plaintiffs Williams and Berthiaume were contacted by the managing editor of *The Friday Observer* who sought to

utilize their distribution organizations for his weekly paper, but neither plaintiff undertook the distribution of this competing newspaper. Nor have plaintiffs proved that the start-up costs of a distribution business are such that, if they do not accept employment with DRI, they could not undertake the distribution of another newspaper. No covenant not to compete after termination was contained in the Dealer's Agreement.

The alleged appropriations of the value of plaintiffs' businesses has not been proved to have had such an adverse effect that the change of system would constitute an unreasonable restraint of trade. Given the generous offer of employment which accompanied the termination notice and the speculative value of these businesses,[22] plaintiffs have failed to prove that the terminations were unreasonable within the purview of §1. In *Noble v. McClatchy Newspapers,* 1972 Trade Cas. ¶73,957 (N.D. Cal. 1972, the court submitted to the jury the question of whether the refusal of a publisher to permit its dealer to sell his dealership, after being notified of his termination, was the result of a contract, combination, or conspiracy in unreasonable restraint of trade. In light of all the circumstances in that case, which unlike the instant case did not include a complete conversion of the distribution system and termination of all dealers, the jury found that the termination was lawful but that the refusal to permit a sale was a violation of §1 of the Sherman

[22]See Section V, *infra.*

Act. In this case, however, the Court has decided the latter issue adversely to plaintiffs.

Plaintiffs' proof on their third alleged anticompetitive effect is also inadequate. To prove that a particular action is unreasonable because it tends to strengthen an already dominant market position, one must first establish that dominance by defining the relevant product and geographic markets and defendants' precise position in those markets.[23] In *Industrial Bldg. Materials, Inc. v. Interchemical Corp., supra* on which plaintiffs rely, there were allegations that Presstite had monopoly power in the industrial sealant industry or at least a dominant position in that market. In reversing the summary judgment granted in Presstite's favor, the Court of Appeals gave plaintiffs the opportunity to prove those allegations to support its claim that its termination was unlawful. Plaintiffs here have had that opportunity, but they have not adequately defined the relevant market by identifying those news and advertising sources which are reasonably interchangeable with defendants' newspapers. In light of the competition in the dissemination of news and advertising which does exist between Bay Area newspapers—large and small—and which may also exist among newspapers, radio, television and direct advertising by mail and handouts, plaintiffs have failed to prove that the suburban newspaper market, in which defendants by definition have a dominant position, is indeed the relevant market

[23]See note 16, *supra.*

or submarket. *Cf. Bowen v. New York News, Inc.*, 366 F.Supp. 651, 675-676 (S.D.N.Y. 1973).[24]

The terminations complained of here were determined necessary by the publisher to change the system of distribution of his newspapers in order to avoid the antitrust violations alleged to exist in his old system while at the same time maintaining as much influence over the circulation of his papers as the law would allow, an influence necessitated by the economic realities of the newspaper business. *Cf. Instant Delivery Corp. v. City Stores Co. (Lit Bros. Div.)*, 284 F.Supp. 941, 947 (E.D. Pa. 1968); *Joseph*

[24]In *Bowen* the court rejected defendant's attempt to include television and other media within the relevant market and cited two cases which held that the daily newspaper is a distinct line of commerce since it occupies a unique position with no real substitute. *Bowen v. New York News, Inc., supra*, at 675 n.56, *citing United States v. Citizen Publishing Co.*, 280 F.Supp. 978, 985-987 (D.Ariz. 1968), *aff'd*, 394 U.S. 131 (1969), and *United States v. Times Mirror Co.*, 274 F.Supp. 606, 617 (C.D. Cal. 1967), *aff'd mem.*, 390 U.S. 712 (1968). It is clear, however, that in each of the cited cases the definition of the relevant market was a factual determination based on the specific facts in the record. In the *Citizen Publishing Company* case, for example, this determination was based upon a large number of specific, findings of fact about the size, content and distribution of other newspapers in the Tucson area, the number of radio and television stations in the Tucson area and their news coverage and advertising content, the preferences of consumers and advertisers, the differences in cost, production and content of radio-television advertising as compared with newspaper advertising, etc. *United States v. Citizen Publishing Company*, supra at 984-992. Market definitions expressed in general terms but based on such specific findings cannot be applied blindly to other cases. The Bay Area, with its metropolitan, satellite city and suburban newspapers, its large number of TV and radio stations, its heterogeneous population, and its unique geography, is a far different factual setting than Tucson or southern California. Plaintiffs simply have not presented evidence sufficient to enable the Court to make the kinds of specific factual findings required to define a relevant market and to assess defendants' position in that parket.

E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., supra at 79. In the particular circumstances of this case, the record does not permit a finding that the change in distribution system and the resulting terminations of plaintiffs had either the anticompetitive purpose or effects necessary to render those actions unreasonable restraints of trade in violation of §1 of the Sherman Act.[25] The decision herein must not be interpreted, however, as providing publishers with a *carte blanche* with respect to the operations of their distribution systems. The question of whether any particular act is unreasonable under the Sherman Act must be decided on the basis of the facts and circumstances of each case. See note 19, *supra.*

[25]Citing certain testimony of defendant Sparks at the damage trial, plaintiffs requested at the end of that phase of the trial that the Court reconsider is ruling on the second cause of action which had been announced orally at the close of the liability phase. Sparks testified that he felt that in order to remain competitive with other media it was "highly advantageous" to exercise as much control over the subscription price of the newspaper as the law would permit and therefore he would have responded in the same way to a price increase by the *Daily Review* dealers as he had to counsel's letter of May 14, 1973. (April 25, 1974 (Morning Session), Tr., pp. 202-204.) This testimony, however, was in response to a hypothetical question on cross examination and does not, therefore, constitute probative evidence of Sparks' actual intent in the specific circumstances of this case. Moreover, Sparks has repeatedly stated that he would act in any circumstances only to the extent permitted by law. Finally, at all relevant times Sparks has only acted pursuant to the advice of counsel. Thus the testimony cited by plaintiffs does not alter the Court's finding that Sparks was not motivated by an anticompetitive intent when he changed his distribution system. Consequently plaintiffs' motion was denied.

That motion also requested an express ruling under plaintiffs' first cause of action that the terminations were in furtherance of a contract to fix prices. That question is considered under Section V(B), *infra.*

C. *Territorial Restraints*

Plaintiffs' third claim for relief charges that defendants have contracted and combined with their independent dealers to impose and enforce territorial restraints on the resale of defendants' newspapers. Since defendants sell the newspapers to the dealers thereby parting with title, risk and dominion, plaintiffs claim that such territorial restrictions are *per se* violations of §1, citing as authority *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). Plaintiffs present as evidence of the existence of territorial restrictions the language of the Dealer's Agreement, the "splits", or divisions, of several of plaintiffs' territories, and defendants' dual rate structure for the wholesale purchase of newspapers.

Defendants contend that the system of territories or routes created by the Dealer's Agreement merely created lawful areas of primary responsibility for each dealer which facilitated the processing of any complaints, start or stop orders, or any other documents or information concerning service or subscribers. Defendants contend that they never engaged in any conduct designed to prevent sales of newspapers to potential customers located outside the boundaries of any dealer's district. Defendants also suggest that *United States v. Arnold, Schwinn & Co., supra,* may not establish a blanket *per se* rule against territorial and customer restrictions on resale. *See, e.g., Albrecht v. Herald Co., supra* at 154-156 (Douglas, J., concurring); *Anderson v. American Automobile Association, supra* at 1244; *Tripoli Co. v.*

Wella Corp., 425 F.2d 932, 936 (3d Cir.) *(en banc), cert. denied,* 400 U.S. 831 (1970).

Whatever may be the extent of the rule anounced in *Schwinn,*[26] it is clear that the holding in that case was predicated not only on the actual existence of territorial (and customer) restrictions on resale but also on the manufacturer's " 'firm and resolute' " insistence on compliance with those restrictions, that " 'firmness' " being "grounded upon the communicated danger of termination." *United States v. Arnold, Schwinn & Co., supra* at 372, *rev'g* 237 F. Supp. 323, 339-342 (N.D. Ill. 1965); *Colorado Pump & Supply Co. v. Febco, Inc.*, 472 F.2d 637, 639 (10th Cir.), *cert. denied,* 411 U.S. 987 (1973); *Janel Sales Corp. v. Lanvin Parfums, Inc.*, 396 F.2d 398, 406-407 (2d Cir.), *cert. denied,* 393 U.S. 938 (1968). Plaintiffs' proof here fails to establish either of these factual predicates by a preponderance of the evidence.

The pertinent language in the Dealer's Agreement is by itself ambiguous.[27] It neither clearly establishes mere primary areas of responsibility, *cf. Plastic Packaging Materials, Inc. v. Dow Chemical Co.*, 327 F.Supp. 213, 215, 225-226 (E.D. Pa. 1971), nor

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[26] See *GTE Sylvania Inc. v. Continental T.V., Inc.*, 1974 Trade Cas. ¶75,072 (9th Cir. 1974).

[27] "That the Company will sell to the Dealer such quantities of [the newspaper] as he shall order, at the mutually agreed upon rate of .... cents per subscribers [sic], per month, up to and including .... subscribers and all subscribers over .... at .... cents per subscriber, to supply the needs of his territory or route known as ....

"That said rate and territory or route shall be subject to re-negotiation upon the giving of ten days notice by either party to the other.'

unequivocally creates an exclusive territorial system by explicitly preventing a dealer from selling beyond his designated territory. *Cf. Bowen v. New York News, Inc., supra* at 672 n.45.

The practice of splitting, or dividing, territories does not by itself, or in conjunction with the language of the Dealer's Agreement demonstrate that defendants, in fact, required plaintiffs and the other dealers to confine their sales within the specific geographic district delineated in their Dealer's Agreement. The fact that a territory may be altered in size or realigned does not prove that the dealer is thereby prevented from selling beyond the new boundaries. There is no evidence that plaintiffs or any other dealer actually tried to sell in an area outside of his new district after it was "split" and was prevented from doing so by defendants. All dealers affected by such splits, including plaintiffs, voluntarily acquiesced in the changes. No split was used to penalize any dealer nor is there any evidence that any dealers were threatened with termination if they did not restrict sales to their own route.[28] In no case was the split implemented without the consent and agreement of the dealer, and whenever a split resulted in a loss of circulation, the dealer's rate was adjusted to avoid any loss of income to the dealer. Following splits of their districts, plaintiffs Beaty and Benham actually experienced an increase in circulation without any adverse adjustment in their rates. Plaintiff Knutson's district was realigned in November, 1970 following dramatic growth of circulation caused by a large volume of office-generated start orders. Shortly after this realignment Knutson's proposed adjustment to his rate was accepted by the management at *The Argus*. Other splits were effected to eliminate service problems and to make distribution more efficient as was the case when the distribution of the *Fremont News-Register* was assimilated into that of *The Argus* in June 1972. Consequently, the infrequent practice of splitting districts does not establish that defendants imposed and enforced territorial restrictions on resales.

[28]See Cleland testimony, November 14-15, 1973, Tr., pp. 310-312.

Finally, plaintiffs point to the dual wholesale rate as evidence that defendants imposed and enforced territorial restraints on plaintiffs' newspaper sales. Under the Dealer's Agreement defendants agreed to sell newspapers to the dealer at a certain rate per subscriber up to a fixed number of subscribers and then at a higher rate for each subscriber over the base number. Plaintiffs contend that such a pricing system in effect penalized them for expanding their circulation by raising the costs of servicing added subscribers, particularly for extra subscribers obtained outside their own territory where delivery costs might also be higher. Allegedly this system effectively discouraged plaintiffs and all other dealers from attempting to sell beyond the territory assigned them by defendants. In the absence of any corroborating evidence, this contention is insufficient to establish either the existence of territorial restraints on sales or the "firm and resolute" enforcement of such restraints by defendants. Apart from a few isolated

instances of rack sales in other dealers' areas there is no evidence that plaintiffs or any dealers attempted to sell outside their territory either before or after September 1, 1973. Had they attempted such sales and had defendants then insisted that they discontinue these sales, clearly threatened them with termination, or actually terminated their contracts, plaintiffs' proof of unlawful territorial restraints would be far stronger. *Cf. Beverage Distributors, Inc. v. Olympia Brewing Co.*, 440 F.2d 21, 30-31 (9th Cir.), *cert. denied*, 403 U.S. 906 (1971); *United States v. Arnold, Schwinn & Co., supra* at 372; *Plastic Packaging Materials, Inc. v. Dow Chemical Co., supra* at 226. On the basis of this record, however, plaintiffs have failed to satisfy their burden of proving that defendants imposed and made efforts to enforce unlawful territorial restraints on plaintiffs' newspaper sales.[28a]

This is not to say that geography played no part in defendants' distribution system. Each dealer was clearly assigned a specific district which had geo-

[28a]The Court is aware that such a dual wholesale rate structure could possibly be used to impose territorial restraints in violation of §1 of the Sherman Act. It is the conclusion of the Court that in view of all the circumstances of the instant case and the economic realities of the distribution systems in question, the dual rate structure here was not susceptible of such abusive utilization. There was no evidence that the number of papers available to any of the dealers at the lower rate precluded them from attempting to distribute newspapers outside of their area of primary responsibility. Furthermore, the parameters of the dual rates (i.e., the number of papers available at the lower rate) were subject to upward renegotiation under the terms of the Dealer's Agreement. There was no evidence of any denial by defendants of a dealer's request for a renegotiation of the rate structure due to a desire to expand sales outside of their primary territory.

graphic boundaries, and defendants encouraged the dealers to concentrate their efforts within those areas. The evidence does not show, on the other hand, that defendants actually prevented any dealer from soliciting subscriptions and delivering newspapers outside of the designated district. Moreover, the evidence presented herein does not establish that the territorial aspects of the distribution system were "ancillary" to the vertical price fixing discussed above, *White Motor Co. v. United States*, 372 U.S. 253, 260 (1963), or that vertical price fixing was such an "integral part of the whole distribution system", *United States v. Bausch & Lomb Co., supra* at 720, that every aspect of that system, including the assignment of districts, is tainted by the presumptive anticompetitive effects of price fixing. *United States v. Arnold, Schwinn & Co., supra* at 375-376. Consequently, plaintiffs are entitled to no relief on the basis of their third claim.

D. *Attempt and Conspiracy to Monopolize*

Plaintiffs' final claim for relief alleges that commencing sometime prior to 1970 defendants attempted and conspired to monopolize the publication of community or suburban daily newspapers in the southern Alameda County area in violation of §2 of the Sherman Act, 15 U.S.C. §2. Plaintiffs contend that the following specific acts constitute sufficient evidence of this violation: (1) defendants' practice of fixing subscription prices and imposing territorial restrictions on resale; (2) the exclusion of competition brought about by the long history of defendants'

acquisitions of competitors and by the termination of the independent dealer system; and (3) the fraud allegedly perpetrated by defendants on the Audit Bureau of Circulations and, in turn, upon advertisers by phony orders and "add-on" contests. Defendants not only attack the sufficiency of plaintiffs' proof but also move to dismiss the fourth claim on the ground that, even if the allegations therein were true, these plaintiffs lack standing to sue.

Turning first to the issue of standing, the Court finds that on the basis of the well-pleaded allegations in this case, which are assumed to be true for the purposes of the motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P., *Brown v. Brown,* 368 F.2d 992, 993 (9th Cir.), *cert. denied,* 385 U.S. 868 (1966); 2A J. Moore, Federal Practice ¶12.08, plaintiffs have standing to sue for the alleged violation of §2.[29]

Defendants' challenge to plaintiffs' standing focuses on the damage claim based on §4 of the Clayton Act, 15 U.S.C. §15.[30] In order to establish standing under that section plaintiffs must first allege injury to their "business or property" and second that this injury occurred "by reason of" an antitrust violation. There is no question that plaintiffs' dealerships are commercial ventures. The question remains, however,

[29]For a very comprehensive and provocative analysis of the entire question of standing see Albert, "Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief," 83 Yale L.J. 425 (1974).

[30]Given the broader scope of §16 of the Clayton Act, 15 U.S.C. §26, *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31,* 481 F.2d 122, 130 (9th Cir.), *cert denied, Morgan v. Automobile Manufacturers Assn., Inc.,* 414 U.S. 1045 (1973), *rehearing denied,* 414 U.S. 1148 (1974), there is apparently no real doubt about plaintiffs' standing to seek injunctive relief under that section.

whether those commercial ventures were injured "by reason of" an antitrust violation, that is, were they within the "target area" of the alleged violation:

> "[A] plaintiff has standing under section 4 of the Clayton Act if the claimed losses fall 'within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry.'" *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31,* 481 F.2d 122, 129 (9 Cir.), *cert. denied, Morgan v. Automobile Manufacturers Assn., Inc.,* 414 U.S. 1045 (1973), *rehearing denied,* 414 U.S. 1148 (1974).

This "target area" test for standing is a "two-step approach [which] first requires identification of the affected area of the economy and then the ascertainment of whether the claimed injury occurred within that area." *Id.* at 129. In the *Vehicle Air Pollution* case the court found that the allegedly "affected" or "endangered" area of the economy was that concerned with the research, development, manufacture, installation and patenting of vehicle air pollution control equipment, clearly an area in which plaintiff crop farmers had no commercial interest. Therefore those plaintiffs lacked standing under §4. *Id.* at 129.[31]

Here plaintiffs have alleged an attempt to monopolize publication of community or suburban daily newspapers in a specified geographic area, and they allege that as an integral part of that attempt to monopolize defendants fixed resale prices, imposed territorial restraints on dealer distribution, and ter-

[31]The various governmental plaintiffs were also held to lack standing under §4 because, *inter alia,* their claims alleged no injury to commercial ventures or enterprises. *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, supra* at 126.

minated all independent home-delivery dealers. These averments indicate that the area of the economy against which the anticompetitive conduct was allegedly directed, *i.e.,* the "endangered" area, includes both the publication and distribution of these community daily newspapers. Plaintiffs' dealerships clearly fall within that "target area". On the basis of their allegations plaintiffs' injury is a "necessary consequence" of acts—price fixing, division of territories, and terminations of dealers—"intended to further the economic concentration [allegedly] sought by defendants, which *must* occur to achieve that end." *Contreras v. Grower Shipper Vegetable Assn.,* 1971 Trade Cas. ¶73,592, p. 90, 453 (N.D. Cal. 1971) (emphasis in original), *aff'd,* 484 F.2d 1346 (9th Cir. 1973), *cert. denied,* ...... U.S. ......, 94 S.Ct. 1445 (1974). As a result plaintiffs here have standing to sue for the alleged violation of §2.

With respect to the §2 violation itself, defendants contend that the evidence fails to establish either a specific intent to monopolize or a dangerous probability of success based upon a showing of market power, both of which are, they argue, necessary elements of an attempt to monopolize claim. Plaintiffs argue that only the specific intent to monopolize need be shown and that the evidence in this case establishes such an intent.

The position of the Court of Appeals for this circuit on the elements of proof required to establish an attempt to monopolize claim has been set forth in a number of recent cases. See *Hallmark Industry v. Reynolds Metals Co.,* 489 F.2d 8, 11-13 (9th

Cir. 1973), *petition for cert. filed,* 42 U.S.L.W. 3613 (U.S. April 11, 1974) (No. 73-1524); *Moore v. Jas. H. Matthews & Co.,* 473 F.2d 328, 332 (9th Cir. 1973); *Bushie v. Stenocord Corporation, supra* at 121; *Cornwell Quality Tools Co. v. C.T.S. Company,* 446 F.2d 825, 832 (9th Cir. 1971), *cert. denied,* 404 U.S. 1049 (1972); *Industrial Bldg. Materials, Inc. v. Interchemical Corp., supra* at 1344; *Lessig v. Tidewater Oil Co.,* 327 F.2d 459, 474-475 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964). In a recent decision this Court reviewed these cases and concluded:

> "The requirement in this Circuit, therefore, is that something more than specific intent is required to establish an attempt to monopolize. Either a dangerous probability of success must be demonstrated, by a showing of market power *or* other evidence, or the claim of an attempt to monopolize must in turn be based upon a substantial claim of restraint of trade. *Cf.* Dobbins v. Kawasaki Motors Corporation, U.S.A., 362 F.Supp. 54, 58-60 (D. Or. 1973)." *Jack Winter, Inc. v. Koratron Co.,* 375 F.Supp. 1, 70 (N.D. Cal. 1974) (emphasis in original).

At the very least it is clear that in order to establish liability for an attempt and conspiracy[32] to monopo-

[32]This showing of specific intent is also an essential part of a claim of conspiracy to monpolize under §2. *Chisholm Brothers Farm Equipment Co. v. International Harvester Co., supra* at p. 11; *Woods Exploration & Pro. Co. v. Aluminum Co. of America,* 438 F.2d 1286, 1304 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972); *Lessig v. Tidewater Oil Co., supra* at 474-475; *United States v. Consolidated Laundries Corp.,* 291 F.2d 563, 573 (2d Cir. 1961); *United States v. Chas. Pfizer & Co.,* 367 F.Supp. 91, 99 (S.D.N.Y. 1973); *Bowl America Inc. v. Fair Lanes, Inc.,* 299 F.Supp. 1080, 1093 (D.Md. 1969); *United Sates v. Jerrold Electronics Corp.,* 187 F.Supp. 545, 567 (E.D. Pa. 1960), *aff'd,* 365 U.S. 567, *rehearing denied,* 365 U.S. 890 (1961).

lize, plaintiffs must prove that defendants possessed "a specific intent to acquire unlawful monopoly power." *Chisholm Brothers Farm Equipment Co. v. International Harvester Co., supra* at p. 11; *Times-Picayune v. United States,* 345 U.S. 594, 626 (1953). See also *Jack Winter, Inc. v. Koratron Co., supra* at 70-71. As in the field of criminal law, this specific intent goes beyond the mere intent to do the act. *United States v. Aluminum Co. of America,* 148 F.2d 416, 432 (2d Cir. 1945). Plaintiffs must prove a "subjective intent to gain an illegal degree of market control." *American Football League v. National Football League,* 323 F.2d 124, 132 n. 18 (4th Cir. 1963). Since the intended result of such an attempted monopolization must be the elimination of one's competitors, the acts from which one can infer this specific intent are essentially predatory in nature. "Neither rough competition nor unethical business conduct is sufficient. The requisite intent must be present and predominant." *Bowl America Inc. v. Fair Lanes Inc., supra* at 1093; *American Football League v. National Football League,* 205 F.Supp. 60, 65 (D. Md. 1962), *aff'd,* 323 F.2d 124 (4th Cir. 1963). Even if a court finds that defendants' practices were not shown to be reasonable at all times, it need not conclude that defendant specifically intended to drive competitors from the field and achieve a monopoly. *United States v. Jerrold Electronics Corp.,* 187 F. Supp. 545, 567 (E.D. Pa. 1960), *aff'd,* 365 U.S. 567, *rehearing denied,* 365 U.S. 890 (1961).

The evidence adduced in this case fails to establish the requisite specific intent to monopolize on the part

of any of the defendants. As this Court has found, defendants did engage in resale price fixing in contravention of the *per se* rules judicially imposed under §1 of the Sherman Act. There is no indication in the evidence as a whole, however, of predatory or knowingly unlawful activity in connection with defendants' effort to establish, by contract, the subscription price of their newspapers. Such a technical violation of §1 does not provide the basis for a finding of specific intent to destroy competition or build monopoly, particularly in view of the fact that defendants here took prompt action to bring their distribution practices into compliance with the antitrust laws after having been informed by plaintiffs' counsel that these practices were unlawful.

Plaintiffs contend that the requisite specific intent to monopolize can also be inferred from the long history of newspaper acquisitions by Sparks and the defendant corporations, the elimination of independent dealers, and other efforts to exclude potential competitors, such as *The Friday Observer.* In March, 1944 Sparks and two other individuals purchased *The Hayward Daily Review.* In December of that year Sparks bought out his two partners. In 1945 Sparks purchased the *San Lorenzo Sun-Journal* which was then a paid weekly, home delivered in the San Lorenzo area. In the 1950's he acquired the *Castro Valley Reporter,* a paid weekly, home delivered in Castro Valley. Subsequently both of the acquired papers became weekly local inserts in *The Daily Review.* Each insert now has a circulation of approximately 2,000. In 1962 DRI, which was organized by

Sparks in 1953 to publish his newspapers, acquired *The Argus* which at that time was a home delivered weekly in Fremont and Newark. DRI acquired the stock of BAPCO in June, 1965, thereby obtaining control of the *Livermore Herald & News* which was then home delivered three times per week primarily in Livermore, and in 1970 BAPCO acquired the weekly *Village Pioneer* which served San Ramon and Dublin. On September 1, 1973, the names of these two newspapers were changed. The *Livermore Herald & News* is now distributed daily as the *Tri-Valley Herald,* and the *Village Pioneer* is now the *Tri-Valley News.* At the time of each of these acquisitions *The Daily Review* also served the areas in which the acquired newspapers circulated.

The final acquisition to which plaintiffs refer occurred in April, 1972, when DRI acquired *The Fremont News Register* and the *San Leandro Morning News* from News Observer, Inc. *The Fremont News Register* was a six-day per week morning paper delivered in Fremont, Newark and Union City; its distribution has subsequently been merged into that of *The Argus.* The *San Leandro Morning News* was a six day per week morning paper delivered in San Leandro, Castro Valley, San Lorenzo and Hayward. Following the acquisition DRI provided free blanket distribution of *The Daily Review* in the area of circulation of the *San Leandro Morning News,* thereby increasing the circulation of *The Daily Review* by approximately 2,000. The areas covered by the two acquired newspapers were also served at the time of the purchase by *The Daily Review,* the *San Francisco*

Chronicle and the *Oakland Tribune* and, in the case of *The Fremont News Register* only, by *The Argus,* the *San Jose Mercury* and the *San Jose News.* In connection with this purchase DRI also acquired three weekly free newspapers (throw-aways), the *Hayward Journal,* the *East Oakland Advertiser,* and the *San Leandro Morning News Advertiser.* The circulation of these three papers largely overlapped with that of *The Daily Review Shopping News,* and DRI thereafter discontinued the publication of these acquired free shoppers. As part of the acquisition from News Observer, Inc., DRI also obtained from the seller corporation and its stockholders, Abraham Kofman, Morton Kofman and Kenneth Kofman, a covenant not to compete which provided that for a period of ten years they would not engage in the newspaper, shopping news, free advertising distribution or other publication business in the City of Oakland and southern Alameda County.

The Court finds that these acquisitions alone are insufficient proof from which to infer a specific intent to monopolize. The parties have stipulated that the April, 1972 acquisition was made because Sparks considered it a good business investment because the added circulation would enable him to reduce his per unit costs by taking advantage of economies of scale, to increase his advertising rates, and to obtain new accounts. Nothing in the record suggests that any of the other acquisitions were made for reasons other than such honest business purposes. The covenant not to compete obtained from the Kofmans has not been shown to be unreasonable or unrelated to the legiti-

mate goal of protecting one's investment in an acquired business. Specific intent must be shown by stronger proof than this.

The independent dealership system was eliminated in order to comply with the antitrust laws, not for the purpose of excluding competitive newspapers by eliminating potential distributors. That legitimate purpose is clear from Sparks' testimony and is corroborated by plaintiffs' failure to show either that any of the *Argus* or *Daily Review* dealers were anxious or even willing to distribute other newspapers or that the start-up costs of a dealership are so great that other newspapers are precluded from organizing their own distribution systems.

Nor do DRI's actions with respect to *The Friday Observer* support a finding of a specific intent to monopolize. In June, 1972, legal counsel for DRI notified *The Friday Observer* that legal action would be taken if it continued to use the name "Observer". No such action has ever been filed even though *The Friday Observer* continues to use that name. In 1973 DRI successfully opposed the petition of *The Friday Observer,* filed in the Alameda County Superior Court, to carry legal advertising originating with the city of San Leandro and the County of Alameda. Defendants have the right to petition all branches of government, including the courts, "to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors" so long as that advocacy is not " 'a mere sham to cover what is actually nothing more than an

attempt to interfere directly with the business relationships of a competitor * * *.' " *California Transport v. Trucking Unlimited,* 404 U.S. 508, 510-511 (1972). Plaintiffs have not shown, however, that in taking what legal action they did with respect to *The Friday Observer,* defendants "sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process" or that defendants' actions form a "pattern of baseless, repetitive claims * * *" thereby barring competitors from meaningful access to the courts. *Id.* at 512, 513. In the absence of such a showing, this Court cannot infer an unlawful specific intent to monopolize from defendants' exercise of their right to petition their government.

Finally, plaintiffs contend that a specific intent to monopolize can be inferred from defendants' alleged plan to defraud the Audit Bureau of Circulations ("ABC"), and ultimately the advertisers who rely on that organization, by means of "add-on" contests and phony start orders. The ABC is a non-profit corporation which has among its members a variety of publications, local and national advertisers and advertising agencies. *The Argus, The Daily Review,* the *Herald,* and the *News* are newspaper members of the ABC. The ABC issues standardized statements of the circulation of its publisher members, verifies the figures shown in these statements by auditors' examination of appropriate records, and disseminates circulation data for the benefit of advertisers, advertising agencies and publishers all of whom rely on

this data for the sale and purchase of advertising space. This data is contained in a semi-annual, unaudited "Publisher's Statement" in which the publisher certifies the facts and figures pertaining to the quantity, quality, distribution and circulation methods of his publications, and in an annual "Audit Report" in which these facts and figures are audited and verified by the ABC. One important figure in both of these statements is the publication's total average paid circulation which is the number of copies of the publication which have been paid for by purchasers not for resale and at a price not less than fifty percent of the basic single copy price or, in the case of a subscription, the basic subscription price.

Periodically, DRI sponsored a promotional contest wherein participating dealers purchased additional copies of *The Argus* and *The Daily Review* for specified periods of time. The daily draw reports and billing statements rendered to the dealers reflected these purchases of *The Argus* and *The Daily Review*. DRI rewarded the participating dealers with a trip to Lake Tahoe or Las Vegas and/or cash in varying amounts depending upon the number of papers "added-on" and the length of time of the "add-on". The increase in purchases of *The Argus* and *The Daily Review* newspapers resulting from the add-on contests was reflected as paid circulation of *The Argus* and *The Daily Review* newspapers in the Publisher's Statements and in Audit Reports issued by the ABC to advertisers, advertising agencies and publishers. These promotional contests generally occurred during

the month when the ABC made its one weekday and one Sunday determination of circulation. These promotional contests resulted in the *Daily Review* and *Argus* dealers increasing their draws at the outset of the contests and then attempting to work off the increased number of papers by obtaining new subscribers. The effect of these promotional contests was that the dealers purchased newspapers which did not represent paid circulation and which temporarily inflated the paid circulation of *The Daily Review* and *The Argus* on the ABC audit reports and six-month publisher's statements. The cash contest prizes awarded pursuant to these promotional contests were paid by check from DRI to the dealers and were not reflected on the dealer's monthly statement as credits. The ABC auditors were provided by DRI with the dealers' monthly statements as well as the number of subscribers obtained by the use of premiums, reduced prices, insurance, and charity promotion sales efforts. The ABC auditors were not advised of the add-on contests.

This evidence does not prove that these contests were intended as anything other than a legitimate promotional device by means of which defendants attempted to obtain actual new subscribers through increased efforts by the dealers and to promote good will among the dealers. The contests were engaged in voluntarily by the dealers without coercion, and many dealers refrained from participating. The evidence with respect to these "add-on" contests does not warrant a finding that defendants sought to dis-

tort circulation figures in order to defraud the ABC and advertisers, and no specific intent to monopolize can be inferred from the use of these contests.

The charge that defendants encouraged and paid for phony start orders, if proved, would be more convincing evidence of a specific intent to monopolize since it is unlikely that such a tactic could have a purpose other than distortion of the circulation figures on which advertisers rely when choosing between competing newspapers. The scheme was purportedly initiated by John Clark, assistant circulation manager of *The Daily Review* and promotion manager of all of defendants' newspapers. Plaintiff Berthiaume testified[33] that in April, 1971 he was approached by Clark who asked him to write dummy start orders, using certain code initials, for former subscribers who had stopped taking the paper and had not actually requested a resumption of service. These orders were to be turned in to Clark who agreed to pay one dollar for each dummy order which was not killed, *i.e.,* found by the newspaper to be no good (NG). The code initials were used so that some of these orders would not actually be verified in order to maintain the usual rate of NG's generally experienced among all start orders and to prevent the orders from being passed along to the carriers. Berthiaume testified that he wrote such phony orders not only for old subscribers but also using a street directory and phone book to obtain names and addresses of new

[33]Plaintiffs' evidence as to these phony orders is based largely on Berthiaume's testimony. See Berthiaume testimony December 1, 1973, Tr., pp. 33 *et seq.*

subscribers for the dummy orders, and he turned them in to Clark periodically and received payment for them. Plaintiffs also alleged that the professional, or "outside", solicitors employed by DRI, such as Felder and Bernie Hoye, also participated in this plan. There is absolutely no evidence in the record, however, which links this scheme to Sparks, and only one remotely possible reference[34] to any other individual defendant, other than Clark. A specific intent to monopolize, *i.e.,* the subjective intent knowingly to create an unlawful monopoly, on the part of Sparks, Cleland or the defendant corporations cannot be inferred from the existence of a plan concocted by a single individual within DRI when neither publisher and owner Sparks nor circulation director Cleland had any knowledge of nor participated in such a scheme.

None of the specific acts on which plaintiffs rely as proof of specific intent to monopolize either singly or cumulatively warrants a finding of such an intent on the basis of the entire record in this case, and having failed to prove by a preponderence of the evidence that defendants collectively or any of them individually harbored that requisite specific intent to monopolize, plaintiffs' claim of attempt and conspiracy to monopolize the publication of daily community newspapers in the southern Alameda County area fails.

Plaintiffs have, therefore, established defendants' liability only for contracting to fix the subscription

[34]The separate notations "Payoff", "Hayward Payoff", and "Dallis" in the check stub records of Hoye & Associates is clearly insufficient to prove that Dallas Cleland had any involvement in or knowledge of the phoney order plan.

prices of their newspapers in violation of §1 of the Sherman Act. Plaintiffs have failed to prove that the termination and transfer provisions of the Dealer's Agreement or the actual termination of all independent home delivery dealers was pursuant to a contract, combination or conspiracy in unreasonable restraint of trade, that defendants imposed unlawful territorial restrictions on the resale of their newspapers, or that defendants attempted or conspired to monopolize the publication of community daily newspapers in the southern Alameda County area.

V. The Damage Issue

Plaintiffs' damage claims are twofold. First, they claim that in the absence of the resale price ceiling imposed by defendants, plaintiffs would have realized higher profits by selling their newspapers to the carriers at higher prices.[35] Second, they allege that their independent dealerships had a going concern value which was lost when defendants terminated the dealership agreements in response to the charges of antitrust violations.

While the price maintenance provision of defendants' Dealer's Agreement has been found to have violated §1 of the Sherman Act, it has been repeatedly

[35]The resale price restriction here differs from the normal situation in that it is one level further down the distribution chain. The actual price which was fixed by the Dealer's Agreement prior to September 1, 1973, was the price at which the newspapers were sold to the public. However, since the publisher also suggested a margin to be paid the carriers, the dealers were effectively restricted because of economic realities as to the price they could charge their carriers.

held that the mere existence of an antitrust violation is not sufficient by itself to support private recovery under Clayton Act §4, 15 U.S.C. §15.[36] " '[T]he gist of the action is legal injury—not mere violation of the statute. The damage for which recovery may be had in a civil action must be proximately related to the conspiracy; recovery for a statutory violation is not based on the conspiracy itself but on injury to the plaintiff produced by specific overt acts pursuant to the conspiracy.' " *Winckler & Smith Citrus Products Co. v. Sunkist Growers, Inc.*, 346 F.2d 1012, 1014 n. 1 (9th Cir.), *cert. denied,* 382 U.S. 958 (1965); *Gray v. Shell Oil Company,* 469 F.2d 742, 749 (9th Cir. 1972), *cert. denied,* 412 U.S. 943 (1973). "By its own terms, Clayton Act recovery is available only where actual injury has been suffered." *Siegel v. Chicken Delight, Inc.,* 448 F.2d 43, 52 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972).

It has also been clear in this Circuit since the landmark case of *Flintkote Co. v. Lysfjord,* 246 F.2d 368 (9th Cir.), *cert. denied,* 355 U.S. 835 (1957), that in order to establish the requisite "actual" or "legal" injury—the fact of damage—"the plaintiff is required to establish with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue." *Ibid.*

[36]15 U.S.C. §15 Provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

at 392.[37] Only then will the fact finder be permitted to "'make a just and reasonable estimate of the damage'" under the more lenient standards announced in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946). *Flintkote* makes this dichotomy very clear:

> "The cases have drawn a distinction between the quantum of proof necessary to show the *fact* as distinguished from the *amount* of damage; the burden as to the former is the more stringent one. In other words, the *fact* of injury must first be shown [as a "reasonable probability"] before the jury is allowed to estimate the *amount* of damage." *Flintkote Co. v. Lysfjord, supra* at 392 (emphasis in original). See also *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 562 (1931)[38]

Applying this requirement that plaintiffs must prove the *fact* of damage, *i.e.*, an actual loss caused by the defendants' wrongful conduct, courts in this Circuit have rejected plaintiffs' damage claims both where there has been insufficient evidence of "actual injury", *Gray v. Shell Oil Co., supra; Siegel v. Chicken Delight, Inc., supra; Flintkote Co. v. Lysfjord, supra; Wolfe v. National Lead Co.*, 225 F.2d 427, 429-432 (9th Cir.), *cert. denied*, 350 U.S. 915 (1955); *Peter v. Union Oil Co.*, 328 F.Supp. 998, 1002-1003 (C.D. Cal. 1971), and where there is inadequate proof that some actual loss was proximately caused by defendants' violation, *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., supra* at 32-33; *Talon, Inc. v. Union Slide Fastener Inc.*, 266 F.2d 731, 736-738 (9th Cir. 1959) (It also appears that in this case the court was not convinced that there was sufficient proof of an actual loss of profits.); *E. V. Prentice Mach. Co. v. Associated Plywood Mills*, 252 F.2d 473, 477-479 (9th Cir.), *cert. denied*, 356 U.S. 951 (1958).

[37]This standard of proof of the fact of damage has also been held to require proof to a "reasonable certainty" of the causal connection between damages alleged and the violation. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 284 F.2d 1, 32 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19 (1962).

[38]This distinction between the fact and the amount of damage and the rule that a lesser degree of proof is permitted only for the latter are also well established in general tort law.

A. *Lost Profits*

Plaintiff's proof of lost profits is based on a "before/after" test in which the "before" or the "damage" period is the time during which plaintiffs were prevented from raising their prices,[39] and the "after" period is the time since September 1, 1973 when plaintiffs have been unrestrained in their price decisions. At various times during this "after" period all of the *Daily Review* dealer plaintiffs and two of the *Argus* dealer plaintiffs have, in fact, raised the price at which they sell to the carriers and have suggested that the carriers charge higher subscription prices; and all testified that they are now experiencing higher

[39]The damage period claimed by the *Daily Review* dealer plaintiffs is generally from September 1, 1969, to August 31, 1973, although three of these seven plaintiffs claim lost profits during a shorter period beginning on February 1, 1970 (Berthiaume), December 1, 1972 (Nyland), and February 1, 1973 (Williams). The claimed damage period for the *Argus* dealer plaintiffs ends on February 28, 1973, since on March 1, 1973, *The Argus* went up to $3.00 a month, *i.e.*, 25 cents above the price then charged for *The Daily Review*. These plaintiffs claim that their damage period commenced on September 1, 1969 (Beaty, Knutson and Dan Dutra) and November 1, 1970 (Benham). Plaintiff Laura Duarte declined to take the stand and testify concerning her loss of profits, and Plaintiffs' Proposed Findings of Fact and Conclusions of Law Re Impact and Damages make no mention of the damage period or the amount of lost profits claimed by Mrs. Duarte. She has apparently waived any claim for lost profits due to the price restraint.

net profits despite the loss in circulation resulting from the price increases.[40]

40

Dealer	Date of Increase	Amount of Suggested Subscription Price Increase	Alleged Increase in Average Net Profit/ Subscriber/ Month	Average Net Profit/ Subscriber/ Month Jan-Aug '73	Alleged Circulation Loss (%) By Pltfs.	By Defs.
Berthiaume	9/1/73	50¢	49¢	41¢	19.1	17.15
R. Dutra	11/1/73	60¢	37¢	36¢	5.1	14.12
Williams	10/1/73	60¢	51¢	41¢	10.5	13.61
Jackson	11/1/73	50¢	39¢	44¢	2.6	13.86
Nyland	10/1/73	60¢	44¢	28¢	23.8	18.81
Kittredge	10/1/73	50¢	43¢	52¢	12.8	12.41
Ely	11/1/73	50¢	45¢	87¢	23.9	13.5
(See Exhibits 198-204A and YYY)						
Beaty	4/1/74	25¢	18¢ (projected; equals average wholesale rate increase in Beaty's district on 4/1/74)		15 (based on average circulation loss of *Daily Review* dealers)	
Benham	4/1/74	25¢	20¢ (projected; equals average wholesale rate increase in Benham's district on 4/1/74)		15 (based on average circulation loss of *Daily Review* dealers)	
(See Exhibits 205A and 205B)						

As to both the fact and amount of damage, the *Argus* dealer plaintiffs, including Beaty and Benham whose price increases occurred too late to create any meaningful "after" period for them, rely on the experience of the *Daily Review* dealers. See Exhibit 205. They contend that the *Daily Review* and *Argus* dealerships are virtually identical, and therefore the *Argus* dealers can establish their injury through the use of the business records of these "comparative but unrestrained enterprises" as permitted in *Flintkote Co. v. Lysfjord, supra* at 392. Without reaching this question of comparability, the Court finds that, since it is based on data from the *Daily Review* dealers' damage studies, the *Argus* dealers' damage proof suffers from the same weaknesses of artificiality and doubtful credibility and therefore does not support their claim for lost profits. It is also interesting to note that the damage estimates for Beaty and Benham based on their April 1, 1974 price increase (Exhibits 205A and 205B) are significantly less than the estimates for those plaintiffs derived from the *Daily Review* dealers' experience (Exhibit 205).

As indicated by the conflicting figures in the above chart, plaintiffs and defendants disagree on the exact percentage loss in circulation that resulted from the *Daily Review* price increases. Given the result reached on the question of the fact of damage, the Court need not resolve this factual issue.

Many of the plaintiffs also testified that they would have raised their prices at the earliest opportunity during the "damage" or "before" period if there had been no restraint on price by defendants. Based on the increased profits allegedly realized in the "after" period and this testimony about their price-raising intent, plaintiffs contend that they have established the *fact* of damage—namely, that but for the price ceiling imposed by defendants during the "before" period, plaintiffs would have made higher profits based upon the higher prices they would have charged. Moreover, by application as constant figures of the profit increases and circulation losses of the "after" period to the whole of the damage period, plaintiffs arrive at an estimate of the *amount* of damage suffered ranging from a low of $1,836 for plaintiff Ely to a high of $36,040 for plaintiff Jackson.

Based on exhaustive review of the record and for the reasons set out below, however, the Court concludes that plaintiffs' proof of the fact of damage falls short of that clearly required by *Flintkote*. Moreover, since plaintiffs' estimate of the amount of their damages is based on exactly the same facts and theory offered on the question of impact, the inadequacies which the Court finds in that proof require that their damage estimates be rejected as speculative and conjectural. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., supra* at 85-88; *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., supra* at 34; *Flintkote Co. v. Lysfjord, supra* at 393.

The first weakness in plaintiffs' proof on the fact of damage concerns the likelihood that any of the

plaintiffs would in fact have raised their prices to their carriers with the result that the subscriber would have paid more than the publisher's "suggested" price during the four-year damage period. Proof that such increases were a reasonable probability is crucial to plaintiffs' damage theory. Because of the "self-evident intengible nature" of proving what might have occurred, the Court clearly cannot require proof to a certainty that such increases would have occurred. *Flintkote Co. v. Lysfjord, supra* at 391-392; *Zenith Corp. v. Hazeltine,* 395 U.S. 100, 123-124 (1969). Nor does the Court necessarily require that plaintiffs prove that they actually engaged in the potentially futile act of violating a price-fixing agreement in order to be able to establish fact of damage at a subsequent trial. See *Continental Co. v. Union Carbide,* 370 U.S. 690, 699-700 (1962); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 377 F.2d 776, 780-781 (3d Cir. 1967), *aff'd in part* 392 U.S. 481, 487 n. 5 (1968). On the other hand, the fact of damage in a case charging maximum price fixing is not automatic once the violation is established as it might be where plaintiffs have been overcharged by a monopolist or by a conspiracy to fix minimum prices. *Gray v. Shell Oil Company, supra* at 750, *distinguishing Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481 (1968).[41] Plain-

[41]It is interesting to note that the District Court in *Hanover Shoe* made a specific finding of fact on an issue analogous to the one considered here. The trial court found that had Hanover been given the opportunity, it would have bought rather than leased defendants' machines thereby avoiding the overcharges. This finding was affirmed by the Court of Appeals and not disturbed by the Supreme Court. *Hanover Shoe, Inc. v. United Shoe Machinery,* 392 U.S. at 404, n. 16.

tiffs must initially establish that fact of damage by showing that there was a reasonable probability that such increases would have occurred. *Cf. Peter v. Union Oil Co., supra* at 1003.

The evidence which they presented on this issue, however, amounted to no more than conjectural hindsight and even contained contradictory assertions of interested parties.[42] Such speculative damage evidence

[42]When questioned on this subject, several of the plaintiffs merely speculated on the fact or amount of these intended price increases:

Robert Dutra:

"Q. [W]hen, prior to September 1, would you have increased your price had you been free to do so? A. Well, that's kind of hard to say. I really don't know." (April 23, 1974, Tr., p. 54.)

Jackson:

"Q. What would you have charged your carrier boys in 1969?

"A. I have no idea. I won't speculate on that.

"Q. You simply say you would have increased your rates but you don't know how much?

"A. Not at this time, four or five years later.

* * * *

"Q. Well, let me ask you this: Are you saying you would not have increased your price in 1969 to your carrier boys?

"A. I am just speculating. I would say if I had the opportunity, I would have.

"Q. How much?

"A. I don't know—five years ago.

* * * *

"Q. Have you ever planned or proposed an increase in price before September 1, 1973?

"A. No.

"Q. You never did?

"A. No.

"Q. You never talked to anyone at the Review about it, did you?

"A. No.

(April 23, 1974, evening Tr., pp. 26-30.)

Kittredge:

"Q. Now, referring to your statement that you would have charged more to your carriers had you been free to

has been repeatedly criticized by the Court of Appeals for this Circuit. *Gray v. Shell Oil Co., supra* at

do so, before September of '73, how far back would you have done that?

[Objection deleted]

"THE WITNESS: Since I started as a dealer, and was familiar with the workings of it.

"MR. FINE: All the way back to before 1969?

"A. Yes.

"Q. Why do you state that you would have gone all the way back before 1969?

"A. Well, I can only assume, myself, that I would have done the same thing that I did when I wasn't bound by the price fixing contract."

(April 23, 1974, evening Tr., p. 9.)

Some plaintiffs flatly stated that they never considered raising their prices; nevertheless they claim lost profits for their entire damage period:

Jackson: see *supra,* lines 11-14.

Beaty:

"Q. Did you ever, during the time you were a dealer, consider increasing your price?

"A. No."

(April 24, 1974, Tr., p. 83.)

Benham:

"Q. What was the price in 1970?

"A. 2.00 per month.

"Q. Did you really consider going up at all at that time?

"A. Not at that time, no."

(April 23, 1974, Tr., p. 119.)

"Q. Well, assuming that your characterization of the letter of May 14th is accurate—I am not really asking you whether you requested the power or authority to set your own rate, I am asking you if at any time prior to July 25, 1973, you personally considered and proposed an increase in your rate to your subscribers?

"A. That is excluding the letter [of May 14, 1973]?

"Q. Yes.

"A. No."

(Benham deposition, p. 19, adopted at April 23, 1974, Tr., p. 121.)

Plaintiff Williams testified that he was claiming damages from January 1, 1973 although he also testified that February 1, 1973 was the earliest time that he could have raised his prices. (April 22, 1974, Tr., pp. 93-94.) In Plaintiffs' Proposed Findings of Fact, Williams' damage period was changed so that it commenced on February 1, 1973. Plaintiff Knutson testified that he did not believe he would have raised his price prior to March 1, 1973

748-750; *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., supra* at 87. The credibility of the evidence is further diminished by the fact that these claims were first made during the trial and lack any corroborating circumstantial evidence. None of the plaintiffs and no other *Daily Review* or *Argus* dealer ever tired to increase his price prior to September 1, 1973, and with the exception of plaintiff Ely, who later contradicted her original testimony on this question,[43] there is no substantial evidence that any of the plaintiffs ever discussed the subject of dealer price increases with managament or with each other during the damage period. Moreover, only two of the *Argus* dealer plaintiffs have actually raised their prices during the "after" period which suggests that competitive pressure from the metropolitan dailies, particularly *The Oakland Tribune,* and even competition between *The Argus* and *The Daily Review* itself actually may have created a market-established price ceiling which would have prevented plaintiffs from raising their prices at all or in the amounts which they now assert would have been their in-

(February 6, 1974, Tr., pp. 67-71, incorporated in damage trial testimony at April 23, 1974, Tr., p. 98), yet he also claims lost profits for the entire period from September 1, 1969, to February 28, 1973. Finally, like Kittredge, plaintiff Ely claims that she would have raised her price soon after she became a dealer (April 24, 1974, Tr., pp. 110-111), but the Court finds it highly unlikely that dealers would institute price increases without previous experience or the benefit of several months operating results. As plaintiff Nyland admitted: "You don't start a job on one day and the next day change the price." (April 22, 1974, Tr., p. 21.)

[43]April 24, 1974, evening Tr., p. 5.

crease.[44] Because of the paucity and doubtful credibility of the evidence on this question, plaintiffs have not satisfied their burden of proof on the first element of the fact of damage, namely, whether there was a reasonable probability that plaintiffs would have raised their prices during the damage period if their price decisions had been unrestrained.

[44]Plaintiffs Robert Dutra and Douglas Knutson clearly acknowledged this market-established price ceiling. With respect to *The Daily Review*, Dutra testified:

"Q. During the period to January 1, 1971, would you have increased the price of the Hayward Daily Review to the same price that the Oakland Tribune was selling?

"A. I don't believe it was the Oakland Tribune—I don't know what it was selling.

"Q. Suppose it was selling for three and a quarter and your contract price was 2.75. I think you stated you would have increased by fifty percent [sic] during the damage period, is that right?

"A. Well, I wouldn't have increased to 3.25 or whatever the Tribune was selling at that time, no.

"Q. You would not have, Okay. Why not?

"A. Well, I think you can price yourself out of the market.

"Q. And you feel——

"A. And I felt that the Tribune was more of a metropolitan paper and I didn't want to lose any more circulation than I could help."

(April 23, 1974, Tr., pp. 67-68.)

Argus dealer Knutson testified as follows:

"Q. Have you given any consideration since September 1 of '73 to increasing your prices to your carriers?

"A. I have considered it, yes.

"Q. And you have not implemented any change?

"A. I have not.

"Q. And what reasons have you for not making any change in your price to your carriers?

"A. Well the main reason is that The Argus was—has been at $3.00 a month and The Daily Review, which is our main, basically the same paper from Hayward, it's a larger paper than the Argus, approximately twice the size paywise [sic], has been selling for $2.75, and I just didn't feel that people would pay more for the Argus than—that much more for the Argus than they would for the Review. They would stop the Argus and take the Daily Review."

(February 6, 1974, Tr., pp. 67-68, incorporated into damage trial testimony at April 23, 1974, Tr., p. 98.)

Even if the Court were to accept plaintiffs' testimony, there is a second and more fundamental flaw in plaintiffs' proof of the fact of damage. That proof is based on a "before/after" test derived from *Bigelow v. RKO Radio Pictures, supra,* 327 U.S. at 258. Bigelow used his "before" period—the years preceding the illegal restraint—as a base period for establishing his normal profits in the absence of restraints which he then compared to the actual receipts during the damage or "after" period. Since plaintiffs here have no business history prior to the restraint, their base period must be that after the restraint was dissolved, and their comparison is of the allegedly normal profits in the "after" period with those realized in the "before" or damage period. While the use of such post-restraint data is not necessarily improper, *see Rangen, Inc. v. Sterling Nelson & Sons,* 351 F.2d 851, 855 (9th Cir. 1965), *cert. denied,* 383 U.S. 936 (1966); *Flintkote Co. v. Lysfjord, supra* at 392-393, a close analysis of plaintiffs' evidence indicates that the very linchpin of their damage theory is fatally defective.

Plaintiffs' damage theory essentially rests on a single figure—the monthly net profit allegedly realized by each plaintiff during the "after" period—found in their profit and loss statements (Exhibits 109A, 110A, 111, 112A, 113, 114A, 115, 116, 117A, 118, 119 (as modified by 119A), and 120). Using that figure[45] plaintiffs first determine their average monthly net

[45]While other data is used in plaintiffs' damage studies, the Court finds that this monthly net profit figure is the variable which most directly affects plaintiffs' computation of their lost profits.

profit per carrier sale during the "after" period from which they derive the increase in average monthly net profit per carrier sale allegedly due to the price increase. In turn that per carrier sale profit increase is used to compute the monthly and, ultimately, the total damage claimed by each plaintiff.[46] However, that central figure in the damage studies—and the unaudited profit and loss statements of their actual operations from which that monthly figure is derived —is in the context of this litigation both inherently suspect and patently artificial. These defects destroy the probative value of the "after" period which is the source of the profit and circulation "market experience" used to show both the fact and amount of damage.[47]

Since plaintiffs' crucial profit and loss data, unlike that in *Bigelow,* was recorded and compiled well after the complaint was filed in the very litigation in which it was to be used to prove actual injury, its credibility is certainly suspect. Plaintiffs clearly had the opportunity to vary their gross income and expense figures during the "after" period in order to exaggerate the favorable impact that price increases might

[46]See *Daily Review* dealer plaintiffs' damage studies, Exhibits 198, 199, 200, 201, 202, 203 and 204, particularly columns g, h and i in Exhibit A, column c in Exhibit D, and column h in Exhibit E in each of these studies. Since the *Argus* dealer plaintiffs derive their estimated damages from those of the *Daily Review* dealers, see Exhibit 205, this monthly net profit figure is equally central to the *Argus* dealers' claims.

[47]The Court's concern here is with the reliability of the "after" period itself as a proper source of accurate damage information rather than with the comparability of the "before" and "after" periods which is argued by both parties in their memoranda and in closing arguments.

have on profitability. Defendants contend that such distortions actually occurred, but the evidence of intentional exaggeration is somewhat inconclusive. Nevertheless some of plaintiffs' profit data strains the Court's credulity to the breaking point. For example, plaintiff Berthiaume claims to have experienced an increase in his monthly average net profit per carrier sale of \$0.49 during the "after" period even though the entire price increase to subscribers was only \$0.50 per month, of which he received only \$0.40, and even though the price increase resulted in a circulation loss of between 17.15% and 19.1%.[48] This \$0.49 figure represents a claimed increase of more than 100% over the \$0.41 average monthly net profit per carrier sale for the period of January-August, 1973. Plaintiffs Robert Dutra, Williams, and Nyland also claim increases of over 100%.[49]

Plaintiffs' profit and loss statements were prepared by an accountant, Russell Masters, who was aware of the purpose for their preparation. He prepared as many as four different sets of financial statements for certain of the plaintiffs. Masters admitted that the accuracy and validity of the statements did not depend upon any audit conducted by him since all of the figures were based on the unverified representations and estimates of plaintiffs and whatever documents they produced with respect to expenses and gross receipts. Moreover, when assessing the

[48]Mechanically, he charged his carriers \$.40 more per subscriber and suggested that they in turn resell to home subscribers at an increased price of \$.50 per month.

[49]See note 40, *supra*.

credibility of these profit and loss statements the Court cannot ignore the fact that the unaudited financial statements originally offered by several of the plaintiffs purportedly reflecting their actual operations indicated significantly higher net profit figures than were reported on those plaintiffs' federal income tax returns for the years in question.[50] With its credibility so seriously called into question, the damage proof—both as to fact and amount—based on the claimed profit experience in the "after" period simply does not constitute the "substantial evidence" required to establish injury. *Flintkote Co. v. Lysfjord, supra* at 392-393.

Another and equally fundamental weakness in plaintiffs' proof of the fact of damage arises from the artificiality of the "after" period upon which the claims of lost profits are based. Plaintiffs conceded that "[d]amages must be predicated on real market conditions * * *."[51] Yet during the entire "after" period one dominant market factor—the wholesale price charged by the publisher and paid by the deal-

[50]Defendants note such discrepancies, ranging between approximately $1,300 and $4,000, for plaintiffs Benham (Exch. QQQQ), Kittridge (Exh. SSSS), Jackson (Exh. UUUU), and Dan Dutra (Exh. WWWW), and the Court also notes similar differences for plaintiffs Nyland (compare exhibits 114 and 128 marked for identification only) and Robert Dutra (compare exhibits 113 and 184 marked for identification only). The Court refused to admit plaintiffs' profit and loss statements into evidence until there was satisfactory proof that the unaudited profit figures claimed by plaintiffs were accurately reflected in amended tax returns filed with the Internal Revenue Service. Plaintiffs' affidavits stating that such amended returns had been filed were filed with this Court on May 23, 1974, June 7, 1974, and July 11, 1974.

[51]Plaintiffs' Reply Memorandum on Damages, p. 11.

ers—has been under a court-imposed restraint that prevents defendants from raising that price. The wholesale price charged by the publisher has a direct and substantial impact on plaintiffs' net profits. Even before receiving the letter of May 14, 1973, the record is uncontroverted that defendants had planned to raise the monthly wholesale price of *The Daily Review* by approximately $.45 on October 1, 1973. Had that price increase gone into effect, it would have had a significant impact on plaintiffs' profits, total circulation, and on the competitive relationships between defendants' newspapers and the competing metropolitan and other newspapers. The judicial prohibition of the scheduled wholesale price increase is an externality which makes the "after" period an artificial rather than a real market experience thereby destroying the probative value of the "before/after" test relied upon by plaintiffs.

In antitrust cases three types of evidence have been approved as providing a basis for the award of damages. "(1) Business records of the plaintiff or his predecessor before the conspiracy arose. (2) Business records of comparative but unrestrained enterprises during the particular period in question. (3) Expert opinion based on items (1) or (2)." *Flintkote v. Lysfjord, supra* at 392. (footnotes omitted). Plaintiffs' evidence of damage based on their own records has been shown to be insufficient to meet their burden of proof on the fact and the amount of damages, and plaintiffs did not present expert testimony on this issue. Had they chosen the comparative method they

would have been equally unsuccessful in their attempt to prove the fact of damage. In connection with their claim for loss of going concern value plaintiffs have vigorously asserted the comparability of the *Daily Review* and *Argus* dealerships involved here with dealerships of *The Sacramento Union*. The Court finds, *infra*, that these dealerships are not comparable, but even if they were assumed to be, the comparative profit figures of these dealerships during the damage period reveal that the restrained plaintiff dealerships were actually more profitable during the damage period than the unrestrained *Sacramento Union* dealerships.[52] For example, plaintiff Beaty testified that the percentage of net profit to gross income of his *Argus* dealership was substantially higher than that of *Sacramento Union* District 700 (which he claimed to be comparable to his dealership) in 1972 and 1973 and that his net income was equal to or greater than that of District 700 in both years even though *The Argus* was selling at $.50 below *The Sacramento Union*. (April 18, 1974, Tr., pp. 360-367.) Daniel Dutra testified that in the year 1973, when the *Argus* advertised subscription rate had increased to $3.00, he had a $0.939 gross profit margin per subscriber while Kay of District 700 had a $0.714 gross profit margin per subscriber when following the suggested

[52]Plaintiffs' explanation for the relative lack of profitability of the *Sacramento Union* dealerships is not supported in the record. They argued that there was a restraint imposed upon the *Sacramento Union* dealers by the publisher but the Court precluded them from attempting to prove contentions not previously raised in the present case. To have ruled otherwise would have required a second substantial trial in an already complex and protracted case.

rate of $3.00. (April 23, 1974, evening Tr., pp. 44-45.) Similarly plaintiff Kittredge (Exh. 110A) earned a larger net profit during the year of 1972 than was generated in the operation of District 700 which he claimed to be comparable to his dealership (April 18, 1974, Tr., p. 364), and this result occurred even though the *Daily Review* advertised subscription price was $2.75—$0.25 less than that of *The Sacramento Union!*

The Court finds that plaintiffs have not shown that there is a reasonable probability that they actually would have increased their prices during the damage period if they had been permitted to do so or that they actually would have realized higher profits had they raised their prices. Consequently, plaintiffs have failed to prove both the fact and amount of damage on their lost profit claim.

B. *Loss of Going Concern Value*

Plaintiffs also claim that they were damaged by the loss of the going concern value of their independent dealerships when defendants terminated their dealership contracts effective, but for the intervention of this litigation, September 1, 1973. Plaintiffs allege that these terminations were pursuant to and in furtherance of defendants' resale price fixing plan. They contend that although no *Daily Review* or *Argus* dealerships have actually been sold, the transfer provisions of the Dealer's Agreement create a saleable going concern value roughly equal to that realized in the recent sales of city-zone districts #700 and #800

and the Roseville country-zone district of *The Sacramento Union.*

Paintiffs here, however, have failed to establish either the requisite causal relationship between violation and alleged injury or sufficient proof of an actual loss of going concern value, both of which are necessary to demonstrate the legal injury—the fact of damage—required by *Flintkote Co. v. Lysfjord,* and *Winckler & Smith Citrus Products Co. v. Sunkist Growers, Inc.*

Turning first to the question of proximate cause, plaintiffs correctly point out that once antitrust liability has been established, the issue becomes one of causation and not of reasonableness of the injury. See *Osborn v. Sinclair Refining Co.,* 324 F.2d 566, 571-572 (4th Cir. 1963). Therefore, the fact that the terminations themselves have not been found to be unreasonable restraints of trade does not preclude the court from finding that the refusals to deal with plaintiffs, inherent in the terminations complained of, were proximately caused by defendants' prohibited price fixing conduct. Once defendants have set in motion an illegal undertaking they will be held accountable for damage caused by any act "pursuant to or in furtherance of the plan" even though the particular act in question may itself be a reasonable business decision. *Standard Oil Co. v. Moore,* 251 F.2d 188, 211 (9th Cir. 1957), *cert. denied,* 356 U.S. 975 (1958). "Legal cause exists between the antitrust wrong and the injury if that wrong is a substantial factor in bringing about the injury. It need not be

the sole or the 'controlling' cause of the injury." *Mulvey v. Samuel Goldwyn Productions,* 433 F.2d 1073, 1075 n. 3 (9th Cir. 1970) *cert. denied,* 402 U.S. 923 (1971).

Rather than being "pursuant to or in furtherance of" defendants' resale price fixing agreement, however, the terminations here were clearly undertaken for the purpose of bringing an end to defendants' antitrust violation by means of a complete change to a new and lawful distribution system. There simply is no evidence of any continuing violation which these terminations could be said to be "pursuant to or in furtherance of". Defendants' new contracts with carriers contain no mentioin of resale price, and there is no credible evidence that defendants have coerced the carriers into charging the suggested resale price. Unlike the defendants in *Albrecht v. Herald Co., supra; Osborn v. Sinclair Refining Co., supra; Dahl v. Hearst Corp., supra; Bowen v. New York News, Inc., supra,* defendants here were not using the terminations to enforce an anticompetitive agreement or combination by coercion and punishment of recalcitrant dealers. Had the instant plaintiffs never questioned the lawfulness of the price restrictions in the Dealer's Agreement it is likely that defendants would have continued to use an independent dealer system based on that agreement. Regardless, the violation does not become a "substantial factor" in bringing about plaintiffs' terminations when defendants act solely to bring their business within the antitrust laws and to avoid further perpetuation of their

wrongdoing. Plaintiffs cite no authority to the contrary.[53] Thus plaintiffs have failed to establish that their terminations as independent dealers were a proximate result, within the meaning of §4 of the Clayton Act, of the price fixing violation.

Even assuming *arguendo* that such a proximate relationship existed, plaintiffs have also failed to prove an equally essential element of the fact of damage, viz., that each dealership had a real value as a going concern which was lost when the Dealer's Agreement was terminated. Plaintiffs have based their right to recovery solely on the federal antitrust laws and have not joined any pendent state law claims for wrongful termination or conversion. In view of the conclusion reached here that the dealerships had no actual value, and since therefore no fact of damage has been shown to exist, the Court need not decide the question whether, under California law, plaintiffs possess any proprietary interest in the dealerships which would survive the lawful exercise of contractual termination rights.

Plaintiffs' attempt to demonstrate both the existence of market value and the actual amount of that value rests almost entirely on a comparison of plaintiffs' dealerships to three *Sacramento Union* dealerships which have actually been sold in the past few

[53]Nor do plaintiffs cite any authority in support of the proposition advanced during closing argument that principles of equity require a wrongdoer to bear the burden of any losses which occur as a result of his efforts to end his wrongdoing. Even if there were such an equitable principle, it is not clear how it could justify an award of treble damages in a case specifically brought under §4 of the Clayton Act.

years.[54] While "[e]xact comparability is neither possible nor necessary", ***Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., supra*** at 88, the evidence of comparability here is clearly insufficient to support a finding that plaintiffs' dealerships have any market value at all or that, assuming the fact of damage were shown by some other evidence, plaintiffs' dealerships are worth an amount similar to that paid for the *Sacramento Union* dealerships.

Plaintiffs contend that the two groups of dealerships are comparable because both involve distribution of newspapers (neither of which is the leading paper in its area) sold at similar prices through independent dealers and carriers to the homes of subscribers in the morning or afternoon. These comparable features are far outweighed, however, by a lengthy list of dissimilarities most of which have a more significant impact on the saleability and value of a dealership than the factors urged by plaintiffs. The competition faced by the newspapers, for example, is entirely different. *The Sacramento Union* has only one significant competitor, the *Sacramento Bee*. *The Daily Review* and *The Argus*, however, face stiff competition from metropolitan dailies (*San Francisco Chronicle, San Francisco Examiner, Oakland Tribune* and *San Jose Mercury-News*), other dailies *e.g.*, (*Berkeley Gazette*), and a number of free and

[54]The date and net sale price of each of these sales is as follows:

District #700	#800	Roseville
4/ 1/70 - $18,000	1/1/71 - $17,000	6/1/70 - $14,355
4/11/72 - $41,962	10/1/71 - $21,000	
	12/1/71 - $22,420	
	12/1/72 - $22,000	
	6/1/73 - $27,500	

controlled circulation newspapers and shoppers. The circulation of *The Sacramento Union* (approximately 107,000) is two and one half times that of *The Daily Review* (42,778 as of March 31, 1973, Exh. 30F) and approximately nine times that of *The Argus* (11,982 as of September 30, 1972, Exh. 34C). Larger newspapers can reap the benefits of economies of scale which favorably affect the unit cost of the newspaper and tend to reduce the publisher's need for circulation revenue. Plaintiffs do not consider this factor nor do they compare the relative financial needs and positions of the two publishers which can also have an effect on the present and future earnings of a dealership.

Of even greater probative value are the significant dissimilarities in the contract provisions which govern the respective dealerships. Since 1967 the *Sacramento Union* dealership contract has had a "vesting" provision which gives the dealer a property right in the dealership by virtue of payments made by him to the *Union* for the circulation contained in the district. The first sale of a *Union* city-zone dealership occurred on August 27, 1968, well after the vesting provision first appeared in the contract. The Court finds that this vesting provision, which is not present in the *Daily Review* and *Argus* contracts, was a significant factor in the development of a market for the *Union* dealership.[55] The *Daily Review* and *Argus*

[55]Plaintiffs assert that it was the right to assign a dealership rather than the vested interest provision which created the market. They note that *Union* country-zone dealerships have been sold since June 1, 1970, despite the absence of a vesting provision in the country-zone contract. The Court finds that the market for

contracts permit termination on thirty days' notice with or without cause while the *Union* contract allows termination only for breach of contract and gives the dealer an opportunity to cure the default. The *Union* contract also requires that the dealer be given an opportunity to sell prior to the effective date of the termination. While it is true that sales of *Union* dealerships did occur under the old contract which permitted termination without cause on thirty days' notice, the record clearly indicates that the *Union* management represented to prospective dealers that this provision had not been and would not be enforced. Purchasers of the dealerships relied on that representation. (April 17, 1974, Tr., pp. 217-222.) *Union* dealers under both the old and new contracts are granted exclusive territories and are, therefore, insulated from all intrabrand competition on price and service. In contrast, there is no such exclusivity of territory in the *Daily Review* and *Argus* contracts. While plaintiffs conceded that the profitability of a dealership is dependent upon the wholesale rates charged by the publisher (April 24, 1974, Tr., pp. 62-63), they completely disregarded the fundamental

the city-zone vested rights dealerships generated a secondary market for the country-zone dealerships. If mere assignment rights were sufficient to generate a market, one would have expected that a mature market would exist for *Daily Review* and *Argus* dealerships whose contracts have permitted assignment with the publisher's consent since 1963. No *Argus* or *Daily Review* dealership has ever been purchased, sold, transferred or assigned for value. Moreover plaintiffs ignore the fact that the management of the *Sacramento Union* has actively aided and participated in the development of a market for *Union* dealerships by supplying forms, making projections of revenues, expenses and profits, locating purchasers, etc.

differences between the rate structure at the *Union* and the *Daily Review*. Thus, at the *Union*, the per unit cost of papers is inversely related to the volume of papers purchased. (Exh. 41C, Exhibit B—Rate Schedule.) At *The Daily Review*, on the other hand, wholesale rates are directly related to volume of purchases—when a dealer exceeds a stated number of papers, a second, higher rate is applied to all papers in excess of the stated amount. Moreover, the *Union* dealers themselves recognize that their new contract, which, *inter alia*, provides for termination only for cause subject to arbitration, is a "very good sales tool" which clearly enhances the marketability of their dealerships. (April 16, 1974, Tr., p. 73.)

Not only have plaintiffs failed to show sufficient comparability to permit the Court to find the existence of the fact of injury, these same deficiencies also undermine their attempt to use the sales of *Union* dealerships to estimate the dollar value of plaintiffs' dealerships. Moreover, in computing their estimated values plaintiffs have ignored both the fact that the price for *Union* dealerships have gradually increased as the market for them has developed and the special circumstances which surrounded the most recent purchases of the two districts (#700 and #800) on which they most rely. In the most recent sales of both of those districts, each had a unique value to the purchaser who already owned the adjacent district and was able to obtain by means of the purchase additional income without a significant increase in overhead. Thus plaintiffs' proof of going concern value

based on the sales of the *Sacramento Union* dealerships is insufficient to establish either the fact or amount of damage on this claim.

Plaintiffs' claim that their dealerships have an actual going concern value also has a second major weakness. It is well established that the appropriate factors to be considered in measuring the "good will" or going concern value of a business are: "(1) What profit has the business made over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner? (2) What is the reasonable prospect that this additional profit will continue into the future, considering all circumstances existing and known as of the date of the valuation?" *Standard Oil Co. v. Moore, supra* at 219; *Simpson v. Union Oil Co.*, 411 F.2d 897, 908-909 (9th Cir.), *rev'd on other grounds*, 396 U.S. 13 (1969). The evidence of record in this case indicates, however, that plaintiffs' dealerships have no such "additional profit" and therefore no actual going concern value. Plaintiffs have little capital invested in their dealerships. The value of each dealership is derived almost exclusively from the labor of the plaintiff-owner. Based on the salary level of defendants' original offer of employment to prospective district managers, the Court concludes that the $13,780 annual compensation is the amount "fairly attributable" to the labor of the owners of these dealerships. Plaintiffs' revised federal income tax-Schedule C's, or profit and loss statements, recently filed with plaintiffs' amended tax returns clearly indicate that the

net profits[56] of their dealerships for the past several years are below and often substantially below that $13,780 figure.[57] Moreover, these past figures contain little indication that there is a "reasonable prospect" that there would be profits over and above the value of the dealer's labor in the future. This absence of a real going concern value within the parameters of *Standard Oil Company of California v. Moore, supra,* precludes a finding that plaintiffs have established the fact of damage on this claim, and it further undermines plaintiffs' inadequate attempt to establish the comparability of plaintiffs' dealerships to those of *The Sacramento Union.*

Plaintiffs have failed to establish the requisite fact of damage for either their claim of lost profits or loss of going concern value. In addition, they have not demonstrated that there is a causal relationship between defendants' violation of Sherman Act §1 and the claimed loss of going concern value. Since plaintiffs base their estimate of the amount of damages for lost profits and loss of going concern value on the same evidence presented on the fact of damage, the inadequacies in that proof render their estimates too

[56]Since defendants' original employment offer includes reimbursement for travel and business expenses in addition to the $13,780 annual salary, the Court finds that plaintiffs' net profit is the appropriate comparison figure for the purpose of estimating the going concern value of the dealerships.

[57]Only two plaintiffs (Jackson and Knutson) show net profits in excess of $13,780. For Knutson the excesses occurred in 1972 and 1973 while Jackson exceeded $13,780 net profit only in 1973. It must be remembered, moreover, that during a portion of 1973 these two dealers had increased their prices to carriers but the publisher had been restrained from increasing his price to them.

speculative to support recovery. Consequently, plaintiffs are not entitled to the monetary relief which they request. A subsequent hearing will be held to determine whether plaintiffs shall be awarded reasonable attorneys' fees in this case.

VI. Equitable Relief

Plaintiffs also seek extensive equitable relief which, for example, would require defendants to continue to sell newspapers at the established rate to plaintiffs as independent contractors for a minimum period of six years unless good cause for termination is shown. In order to be entitled to injunctive relief under Clayton Act §16, 15 U.S.C. §26,[58] plaintiffs must "demononstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Corp. v. Hazeltine,* 395 U.S. 100, 130 (1969). Injunctive relief is designed to prevent continuing or future wrongs, not to punish past acts. *United States v. Oregon Med. Soc.,* 343 U.S. 326, 333 (1952). The only antitrust violation found in this case was the resale price fixing component of the old Dealer's Agreement which plaintiffs concede has not been in effect since September 1, 1973. While plaintiffs assert that defendants are continuing to fix resale prices by

[58]Clayton Act §16 provides in pertinent part:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief * * * against threatened loss or damage by a violation of the antitrust laws * * * when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity * * *."

coercing the carriers, the record is devoid of credible evidence to support this contention. There is nothing in the record which suggests that the past violation is likely to recur or that there is in defendants' conduct any other impending antitrust violation. On the contrary, there is clear proof that defendants are diligently trying to purge their distribution system of the anticompetitive conduct and operate their business within the law.

From the nature of the equitable relief requested, it is clear that, in the guise of an asserted need to dissipate the effects of the past violation, plaintiffs seek to enjoin the termination of their Dealer's Agreements rather than any unlawful price restraints. This Court has found that in the circumstances of this case the terminations themselves were not an unreasonable restraint of trade nor were they in furtherance of any pre-existing unlawful restraint. Accordingly, plaintiffs' request for injunctive relief must fail since "[a]n injunction can issue only after the plaintiff has established that the conduct sought to be enjoined is illegal and that the defendant, if not enjoined, will engage in such conduct." *United Transportation Union v. Michigan Bar,* 401 U.S. 576, 584 (1971).

Moreover, having taken into account the balance of equities, the Court finds that the relief sought by plaintiffs is inappropriate. At the time plaintiffs were notified of the terminations of the Dealer's Agreement, they were offered employment by defendants on very favorable terms and conditions. Defendant

Sparks testified that the continuation of the current dual distribution system would have an adverse effect on the financial condition of *The Argus* and *The Daily Review.*[59]

While declining to order equitable relief in the form requested by plaintiffs, the Court will continue in effect the stipulated temporary injunction until October 1, 1974 to enable plaintiffs to give due consideration to the offer of employment in light of the Court's rulings herein or to make other plans.[60] Pursuant to this temporary injunction defendants will be required to offer employment as district managers to each of the plaintiffs unless good cause can be shown by defendants for withdrawing the offer. The question of whether good cause has been shown will be subject to binding arbitration with the arbiter or arbiters to be chosen by the mutual agreement of the parties or by the Court if the parties cannot agree. In addition, all plaintiffs who do not accept employment or who are not hired will be required to return to defendants all current and updated documents and information concerning subscribers, carriers, paper drops, and other information regarding service within their district which they received at the time they became dealers for defendants.

[59]This testimony was also supported by *in camera* testimony and examination of certain of defendants' financial statements.

[60]It should be noted that the Court orally advised the parties of its decision on July 18, 1974 and then presented a draft of this opinion to them on July 26, 1974. These facts are interjected lest it might appear that insufficient time existed between the rendering of this final written decision and the October 1, 1974 expiration date of the stipulated temporary injunction.

The foregoing constitutes the Court's Findings of Fact and Conclusions of Law as required by Rule 52(a), Federal Rules of Civil Procedure.

Defendants are directed to prepare a form of judgment in accordance with this memorandum of opinion.

Dated: September 23, 1974.

/s/ Charles B. Renfrew
Charles B. Renfrew
United States District Judge

Appendix "C"

United States District Court
Northern District of California

Civil No. C 73 1354 CBR

Douglas K. Knutson, et al.,
Plaintiffs,
vs.
The Daily Review, Inc., a corporation, et al.,
Defendants.

[Filed Sep. 24, 1974]

ORDER AND JUDGMENT

This action came on for trial before the Court, Honorable Charles B. Renfrew, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered.

It is Ordered and Adjudged

1. That the plaintiffs have established that the defendants, The Daily Review, Inc., Bay Area Publishing Company, Floyd L. Sparks, William Chilcote, Dallas Cleland and John Clark, and each of them, have violated Section 1 of the Sherman Act (15 U.S.C. §1) under their First Claim, but that the plaintiffs shall take nothing under their First Claim and that said First Claim be dismissed on the merits.

2. That plaintiffs take nothing on their Second Claim and that said Second Claim be dismissed on the merits.

3. That plaintiffs take nothing on their Third Claim and that said Third Claim be dismissed on the merits.

4. That plaintiffs take nothing on their Fourth Claim and that said Fourth Claim be dismissed on the merits.

5. That plaintiffs have and recover from defendants The Daily Review, Inc., Bay Area Publishing Co., Floyd L. Sparks, William Chilcote, Dallas Cleland and John Clark, and each of them, their costs of suit incurred herein in the amount of $..

6. That plaintiffs have and recover from defendants The Daily Review, Inc., Bay Area Publishing Co., Floyd L. Sparks, William Chilcote, Dallas Cleland and John Clark, and each of them, a reasonable attorneys' fee in the amount of $..

7. That the terms of stipulated temporary injunction shall be continued in effect until October 1, 1974 at which time defendants will be required to offer employment as district managers to each of the plaintiffs unless good cause can be shown by defendants for withdrawing the offer. The question of whether good cause has been shown will be subject to binding arbitration with the arbiter or arbiters to be chosen by the mutual agreement of the parties or by the Court if the parties cannot agree.

8. All plaintiffs who do not accept employment or who are not hired will return to defendant The Daily Review, Inc. all current and updated documents concerning subscribers, carriers, paper drops and other information regarding service within their district which they received at the time they became dealers for defendant The Daily Review, Inc.

9. That the equitable relief by way of injunction sought by the plaintiffs is denied.

Dated: September 23, 1974.

Clerk
United States District Court
Northern District of California
By /s/ Ronald W. Davis
Deputy Clerk

Approved:
/s/ Charles B. Renfrew
Charles B. Renfrew
United States District Judge

Appendix "D"

United States Court of Appeals
for the Ninth Circuit

Douglas K. Knutson, et al., Plaintiffs-Appellants, vs. The Daily Review, Inc., et al., Defendants-Appellees.	No. 74-2802
The Daily Review, Inc., et al., Defendants-Appellants, vs. Douglas K. Knutson, et al., Plaintiffs-Appellees.	No. 74-3423

[Filed Dec. 30, 1976]

Appeal from the United States District Court
Northern District of California

ORDER

Before: MERRILL and HUFSTEDLER, Circuit Judges, and SMITH,* District Judge.

Plaintiffs-appellants' petition for rehearing is DENIED.

*Honorable Russell E. Smith, Chief Judge, United States District Court, District of Montana, sitting by designation.

Appendix "E"

United States Court of Appeals
for the Ninth Circuit

Douglas K. Knutson, et al., Plaintiffs-Appellants, vs. The Daily Review, Inc., et al., Defendants-Appellees.	No. 74-2802
The Daily Review, Inc., et al., Defendants-Appellants, vs. Douglas K. Knutson, et al., Plaintiffs-Appellees.	No. 74-3423

[Filed Feb. 8, 1977]

ORDER

Before: MERRILL and HUFSTEDLER, Circuit Judges, and SMITH,* District Judge.

A majority of the panel has voted to deny the petition for rehearing. Judge Hufstedler voted to reject the suggestion for a rehearing en banc. Judge Merrill

*Honorable Russell E. Smith, Chief Judge, United States District Court, District of Montana, sitting by designation.

recommended that the suggestion for rehearing en banc be rejected.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1544

DOUGLAS K. KNUTSON, ARLEN N. BENHAM, GEOFFREY BEATY, LAURA DUARTE, EVAN FRANCIS WILLIAMS, JOSEPH W. BERTHIAUME, KENNETH W. JACKSON, JEAN E. NYLAND, DANIEL A. DUTRA, WILLARD B. KITTREDGE, ROBERT A. DUTRA,

Petitioners,

vs.

THE DAILY REVIEW, INC., a corporation, BAY AREA PUBLISHING CO., a corporation, FLOYD L. SPARKS, an individual, WILLIAM CHILCOTE, an individual, DALLAS CLELAND, an individual, JOHN CLARK, an individual, CARL FELDER, individually and doing business as Felder Enterprises,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

MICHAEL N. KHOURIE,
THOMAS PAINE,
One California Street,
San Francisco, California 94111,
Counsel for Respondents.

BROAD, KHOURIE & SCHULZ,
One California Street,
San Francisco, California 94111,
Of Counsel for Respondents.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1544

Douglas K. Knutson, Arlen N. Benham, Geoffrey Beaty, Laura Duarte, Evan Francis Williams, Joseph W. Berthiaume, Kenneth W. Jackson, Jean E. Nyland, Daniel A. Dutra, Willard B. Kittredge, Robert A. Dutra,

Petitioners,

vs.

The Daily Review, Inc., a corporation, Bay Area Publishing Co., a corporation, Floyd L. Sparks, an individual, William Chilcote, an individual, Dallas Cleland, an individual, John Clark, an individual, Carl Felder, individually and doing business as Felder Enterprises,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

Respondents, The Daily Review, Inc., *et al.,* (defendants below) respectfully pray that the Petition for a Writ of Certiorari (No. 76-1544) filed May 7, 1977 by Douglas K. Knutson, *et al.,* and received by counsel for respondents on May 9, 1977, be denied.

QUESTION PRESENTED

Stripped of argumentative assertions, the sole question raised by this Petition appears to be:

Should this Court review and reverse the findings of the trial court, unanimously affirmed by the Court of Appeals that

a.) The termination of petitioners' distribution agreements neither violated Section 1 of the Sherman Act (15 U.S.C. §1) nor gave rise to a viable claim for damages under Section 4 of the Clayton Act (15 U.S.C. §15); and

b.) The Argus petitioners suffered a complete failure of proof on the *fact* of damage issue.

STATEMENT OF THE CASE

This Petition seeks further review of the trial court's findings of fact in a private antitrust suit seeking damages and injunctive relief under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§15 and 26). Petitioners (plaintiffs below) are a group of wholesale distributors of two suburban newspapers published by the corporate respondent, The Daily Review, Inc. ("D.R.I."). The individual respondents are management officials of D.R.I. The Complaint, filed in August 1973, alleged several violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2), arising in the context of a newspaper distribution system using independent contractors for wholesale distribution and its replacement by a system using company employees.

The case was assigned to the Honorable Charles B. Renfrew, United States District Judge for the Northern District of California. Judge Renfrew pre-

sided over a non-jury trial which consumed 28 trial days and generated a Reporter's Transcript exceeding 4,000 pages in length. At the conclusion of that trial Judge Renfrew rendered an 83 page Opinion (Appendix B to the Petition) addressing every issue raised in this case.

Germane to the instant Petition, Judge Renfrew found that while the distributor agreements between the plaintiffs and D.R.I. contained a resale price provision violative of the Sherman Act, the conversion of the wholesale distribution of defendants' newspapers from independent contractors to company employees terminated rather than perpetuated that restraint. The conversion was therefore lawful under the antitrust laws and could not support a viable claim for damages:

> "Rather than being 'pursuant to or in furtherance of' defendants' resale price fixing agreement, however, the terminations here were clearly undertaken for the purpose of bringing an end to defendants' antitrust violation by means of a complete change to a new and lawful distribution system. There simply is no evidence of any continuing violation which these terminations could be said to be 'pursuant to or in furtherance of'. Defendants' new contracts with carriers contain no mention of resale price, and there is no credible evidence that defendants have coerced the carriers into charging the suggested resale price. . . . *the violation does not become a 'substantial factor' in bringing about plaintiff's terminations when defendants act solely to bring their business within the antitrust laws and to avoid further perpetuation of their wrongdoing.* Plaintiffs cite

no authority to the contrary. Thus plaintiffs have failed to establish that their terminations as independent dealers were a proximate result, within the meaning of §4 of the Clayton Act, of the price fixing violation." (Appendix B at 127-128; footnote omitted, emphasis added).

The considered nature of this finding is demonstrated by the trial court's meticulous analysis of each piece of evidence and each argument raised by the petitioners in their Petition to this Court. (See Appendix B at 64-87).

The finding that the termination of the plaintiffs' distribution agreements and the conversion of the system of distribution was not in furtherance of the resale price violation was unanimously affirmed by the Court of Appeals. In responding to the claims petitioners make before this Court, the Ninth Circuit stated:

> "As to the second price restraint, that on the retail price to subscribers, plaintiffs claim that the terminations were used to foster an anticompetitive scheme. They argue that Sparks eliminated the distributors so his newspapers could influence directly the prices charged by the carriers and the remaining adult independents (motor route, retail account, and street sale dealers). . . .
>
> "While the uncontested facts demonstrate Sparks' unalloyed intent to establish uniform prices for his newspapers, the totality of his actions does not amount to the requisite quantum of coercion: no 'meaningful event depend[ed] on compliance or noncompliance' with his requests of the carriers. (*Butera v. Sun Oil Co.* (1st Cir. 1974) 496 F.2d 434, 437.)
>
> * * * * *
>
> "Plaintiffs have thus failed to show coercion of the remaining independents and have, therefore, not proven that the terminations were in furtherance of a retail price-fixing scheme." (Appendix A to the Petition at 16-19).

The Court of Appeals also unanimously affirmed the trial court's ruling that because the terminations were lawful, no viable damage claim could be made in the following language:

> "They [the plaintiffs] also claimed loss of the going concern value of their dealerships and sought an injunction to enable them to continue in business. Since, as the district court found (383 F.Supp. 1384-89) and we affirm, the terminations, pursuant to a valid contract, were legal and did not further an antitrust violation, the plaintiffs were not entitled to any damages . . ." (Appendix A at 28).

REASONS FOR DENYING THE PETITION

The instant Petition should be denied because the lower courts properly applied well established principles of antitrust law to findings of fact made by the trial court and unanimously affirmed by the Court of Appeals. The Petition raises no legal issue worthy of the Court's attention, and no legitimate antitrust policy warrants award of windfall treble damages for the lawful conversion of a distribution system to bring

it into compliance with, rather than violation of, federal antitrust policies.

THE COURTS BELOW PROPERLY CONSTRUED AND APPLIED THIS COURT'S DECISIONS

Both the trial court and the Court of Appeals properly ruled that the termination of the distributor agreements violated the Sherman Act only if it furthered or perpetuated a violation of that law. This rule is an application of this Court's rulings that a manufacturer of a product, for which substitutes are readily available, is free to select his customers without violating the antitrust laws [*United States v. Colgate & Co.,* 250 U.S. 300 (1919); *United States v. Parke, Davis & Co.,* 362 U.S. 29 (1962); *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, at 376 (1967)], and that vertical integration is not unlawful unless the effect is to unreasonably restrict the opportunities of competitiors to market their products [*United State v. Columbia Steel Co.,* 334 U.S. 495, at 524-526 (1948)].

Due to the plaintiffs' failure of proof that the conversion was either motivated by a purpose, or had the effect, of unreasonably restraining trade or commerce, the lower courts properly held the terminations to be lawful and just as properly denied the plaintiffs' claims for damages allegedly flowing from the terminations. Any injury suffered through the termination resulted from actions in compliance with, rather than violation of, the Sherman Act. An award of damages therefor, due to the existence of the earlier pricing provision, would have nothing to do with the aspect of vertical resale price maintenance which renders it unlawful. As this Court unanimously held in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* ...... U.S. ......, 50 L.Ed.2d 701 (1977) proof of more than a mere causal relationship between financial "injury" and the existence of unlawful conduct is required to support an award of damages under Section 4 of the Clayton Act:

> ". . . it is quite clear that if respondents were injured, it was not 'by reason of anything forbidden in the antitrust laws': while respondents' loss occurred 'by reason of' the unlawful acquisitions, it did not occur 'by reason of' that which made the acquisition unlawful.
>
> "We therefore hold that for plaintiffs to recover treble damages on account of §7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendents' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violation . . . would be likely to cause.' *Zenith Radio Corp. v. Hazeltine Research, Inc., supra,* 395 US at 125, 23 L Ed 2d 129, 89 S.Ct. 1562." (...... U.S. ......; 50 L.Ed. 2d at 712; footnote omitted).

On the record made in this case, and the findings of fact made and affirmed by the courts below, the alleged

injury from the conversion of D.R.I.'s system of distribution does not reflect either the anticompetitive effect of the violation or of anticompetitive acts made possible by the violation. Damages under Section 4 of the Clayton Act consequently cannot be lawfully awarded.

THE FACTUAL ISSUES RAISED BY THE PETITION DO NOT MERIT REEXAMINATION BY THIS COURT

The Petitioners' claims have been rejected by the trial court and twice by the three judges constituting the panel of the Court of Appeals which heard this case, once on their initial decision and again on petition for rehearing. Examination of the opinions of both of the lower courts provides the basis for a conclusive negative answer to the questions presented by the Petition, and which merely reargue the evidence in this case. Nothing in the Petition shows a need for this Court to devote any of its severly limited time to reexamination of the unanimous judgment of all of these judges on these issues.

To challenge this unanimity, Petitioners assert that the Court of Appeals "refused to consider the evidence" concerning alleged efforts to control resale prices after the termination (Petition at 19). The portion of that court's opinion quoted at pages 4-5 above, however, demonstrates that the Court of Appeals did consider that evidence. Furthermore, even if there were not an express reference to the plaintiffs' claims, this Court should not assume that the lower courts failed to consider it. *Bouldin v. Holman,*

394 U.S. 478, at 479 (1959). And as this Court held in *Gutierrez v. Waterman S.S. Corp.,* 373 U.S. 206 (1963), the credibility of the witnesses and of the evidence is properly determined by the trial court rather than appellate courts. In the instant case, as in *Gutierrez,* the finder of fact refused to believe the plaintiffs' evidence or to draw the inferences and conclusions which plaintiffs contend are supported by the evidence.

The "two-court" rule applied by this Court mandates denial of this Petition. See *Berenyi v. Immigration Service,* 385 U.S. 630, at 635-636 (1967); *Comstock v. Group of Institutional Investors,* 335 U.S. 211 (1948); *Allen v. Trust Company of Georgia,* 326 U.S. 630, at 636 (1946): "Here two courts have resolved that question of fact in favor of respondents . . . . Those findings, being concurrent findings of the two lower courts, will be accepted here without reexamination." The justification for this rule was expressed by Justices Brennan, Douglas and Stewart in their concurring and dissenting opinion in *Neil v. Biggers,* 409 U.S. 188, at 203 (1972):

> "The 'two-court' rule, however, rests upon more than mere deference to the trier of fact who has a firsthand opportunity to observe the testimony and to gauge the credibility of witnesses. For the rule also serves as an indispensable judicial 'timesaver,' making it unnecessary for this Court to waste scarce time and resources on minor factual questions which have already been accorded consideration by two federal courts and whose resolution is without significance except to the parties immediately involved."

In the instant case, both deference to the lower courts' factual findings and recognition of the scarcity of time and resources of this Court require rejection of the instant Petition.

CONCLUSION

For the reasons stated, this Petition should be denied.

Dated, June 6, 1977 at San Francisco, California.

Respectfully submitted,
MICHAEL N. KHOURIE,
THOMAS PAINE,
Counsel for Respondents.

BROAD, KHOURIE & SCHULZ,
Of Counsel for Respondents.

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